No. 18-489	
Title:	**Bradley Weston Taggart, Petitioner** **v.** **Shelley A. Lorenzen, Executor of the Estate of Stuart Brown, et al.**
Docketed:	October 16, 2018
Lower Ct:	United States Court of Appeals for the Ninth Circuit
Case Numbers:	(16-35402, 16-60032, 16-60033, 16-60039, 16-60040, 16-60042, 16-60043)
Decision Date:	April 23, 2018
Rehearing Denied:	September 7, 2018
Questions Presented	

DATE	PROCEEDINGS AND ORDERS
Oct 15 2018	Petition for a writ of certiorari filed. (Response due November 15, 2018) **Petition** **Appendix** **Certificate of Word Count** **Proof of Service**
Oct 16 2018	Blanket Consent filed by Petitioner, Bradley Weston Taggart. **Blanket Consent**
Oct 26 2018	Motion to extend the time to file a response from November 15, 2018 to December 14, 2018, submitted to The Clerk. **Main Document**
Oct 29 2018	Motion to extend the time to file a response is granted and the time is extended to and including December 14, 2018.
Nov 08 2018	Brief amici curiae of Honorable Eugene Wedoff (ret.), et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Nov 15 2018	Brief amici curiae of National Consumer Bankruptcy Rights Center, et al. filed. **Main Document** **Certificate of Word Count** **Other** **Proof of Service**
Dec 11 2018	Letter waiving the 14-day waiting period under Rule 15.5 filed. **Main Document**
Dec 14 2018	Brief of respondents Shelley Lorenzen, et al. in opposition filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Dec 19 2018	DISTRIBUTED for Conference of 1/4/2019.

Dec 20 2018	Reply of petitioner Bradley Weston Taggart filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 04 2019	Petition GRANTED.
Feb 06 2019	Blanket Consent filed by Petitioner, Bradley Weston Taggart. **Blanket Consent**
Feb 11 2019	SET FOR ARGUMENT on Wednesday, April 24, 2019
Feb 19 2019	Joint appendix filed. **Main Document** **Proof of Service**
Feb 19 2019	Brief of petitioner Bradley Weston Taggart filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Feb 20 2019	Brief amici curiae of Honorable Eugene Wedoff (ret.), et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Feb 26 2019	Brief amicus curiae of United States in support of neither party filed. **Proof of Service** **Main Document**
Feb 26 2019	Brief amici curiae of National Consumer Bankruptcy Rights Center and The National Association of Consumer Bankruptcy Attorneys filed. (Corrected version submitted)
Feb 26 2019	Brief amici curiae of National Consumer Bankruptcy Rights Center and The National Association of Consumer Bankruptcy Attorneys filed (3/11/2019). **Main Document** **Proof of Service** **Certificate of Word Count**
Mar 20 2019	CIRCULATED
Mar 21 2019	Record requested from the U.S.C.A. 9th Circuit.
Mar 21 2019	Brief of respondents Shelley Lorenzen, et al. filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 25 2019	Record received from the U.S.C.A. 9th Circuit and the U.S. Bankruptcy Court District of Oregon is electronic and located on Pacer, with the exception of some restricted district court documents that is electronic. The record is complete.
Mar 27 2019	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed. **Proof of Service** **Main Document**

Mar 28 2019	Brief amici curiae of State of California, et al. filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 28 2019	Brief amicus curiae of National Creditors Bar Association filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Apr 12 2019	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Apr 17 2019	Reply of petitioner Bradley Weston Taggart filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Apr 24 2019	Argued. For petitioner: Daniel L. Geyser, Dallas, Tex. For United States, as amicus curiae: Sopan Joshi, Assistant to the Solicitor General, Department of Justice, Washington, D. C. For respondents: Nicole A. Saharsky, Washington, D. C.
Jun 03 2019	Judgment VACATED and case REMANDED. Breyer, J., delivered the **opinion** for a unanimous Court.
Jul 05 2019	JUDGMENT ISSUED.

NAME	ADDRESS	PHONE
Attorneys for Petitioner		
Daniel L. Geyser Counsel of Record	Geyser P.C. One Energy Square 4925 Greenville Ave., Ste. 200 Dallas, TX 75206 daniel.geyser@geyserpc.com	214-800-2660
Party name: Bradley Weston Taggart		
Attorneys for Respondents		
Nicole A. Saharsky Counsel of Record	Mayer Brown LLP 1999 K Street NW Washington, DC 20006 nsaharsky@mayerbrown.com	202-263-3052
Party name: Shelley Lorenzen, et al.		
Michael B. Kimberly	Mayer Brown, LLP 1999 K Street, NW Washington, DC 20006 mkimberly@mayerbrown.com	(202) 263-3127
Party name: Shelley Lorenzen, et al.		

Hollis Keith McMilan	Hollis K. McMilan, P.C. 4504 SW Corbett Ave., Ste 210B Portland, OR 97239 hmcmilan@hkmlaw.com	503 972-5092

Party name: Keith Jehnke, Terry W. Emmert, and Sherwood Park Business Center LLC

Other

David R. Kuney Counsel of Record	9200 Cambridge Manor Court Potomac, MD 20854 davidkuney@dkuney.com	301-299-9544

Party name: Honorable Eugene Wedoff (ret.), Honorable Leif Clark (ret. and a group of law professors

Karli Ann Eisenberg Counsel of Record	California Department of Justice, Office of the Attorney General 1300 I Street Sacramento, CA 95814 karli.eisenberg@doj.ca.gov	9162107913

Party name: State of California, et al.

Noel J. Francisco	Solicitor General United States Department of Justice 950 Pennsylvania Avenue, NW Washington, DC 20530-0001 SupremeCtBriefs@USDOJ.gov	202-514-2217

Party name: United States

Nicole Marie Strickler Counsel of Record	Messe. Strickler, Ltd . 225 W. Washington St.,Ste. 575 Chicago, IL 60606 nstrickler@messerstrickler.com	3123343442

Party name: National Creditors Bar Association

Tara Twomey Counsel of Record	National Consumer Bankruptcy Rights Center 1501 The Alameda San Jose, CA 93921 tara.twomey@comcast.net	8312290256

Party name: National Consumer Bankruptcy Rights Center and The National Association of Consumer Bankruptcy Attorneys

No.

In the Supreme Court of the United States

BRADLEY WESTON TAGGART, PETITIONER

v.

SHELLEY A. LORENZEN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

JOHN M. BERMAN
7175 SW Beveland St., Ste. 210
Tigard, OR 97223

DANIEL L. GEYSER
Counsel of Record
GEYSER P.C.
One Energy Square
4925 Greenville Ave., Ste. 200
Dallas, TX 75206
(214) 800-2660
daniel.geyser@geyserpc.com

QUESTION PRESENTED

This case presents a clear and intractable conflict regarding an important question of federal bankruptcy law.

According to the Ninth Circuit, a "creditor's good faith belief that the [Bankruptcy Code's] discharge injunction does not apply * * * precludes a finding of contempt," even if the creditor acted "unreasonbl[y]" in violating a debtor's rights. That holding directly conflicts with the decisions of three courts of appeals, two bankruptcy appellate panels, and dozens of lower courts. Contrary to the Ninth Circuit, these other courts hold that the Code authorizes relief for discharge violations, irrespective of a creditor's good faith: "'the focus of the court's inquiry in civil contempt proceedings is not on the subjective beliefs or intent of the alleged contemnors in complying with the order, but whether in fact their conduct complied with the order at issue.'"

This "ineluctabl[e]" conflict was recognized by the panel, and it has since been acknowledged by multiple judges and expert commentators. The question presented was the sole basis for the decision below, and the relevant facts are clean and undisputed. Its correct disposition is vital to the proper administration of the Code, and this case is the ideal vehicle for resolving the entrenched conflict.

The question presented is:

Whether, under the Bankruptcy Code, a creditor's good-faith belief that the discharge injunction does not apply precludes a finding of civil contempt.

PARTIES TO THE PROCEEDING BELOW

Petitioner is Bradley Weston Taggart.

Respondents are Shelley A. Lorenzen, executor of the estate of Stuart Brown; Terry W. Emmert; Keith Jehnke; and Sherwood Park Business Center, LLC.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 2
Statutory provisions involved 2
Introduction 2
Statement 4
Reasons for granting the petition 11
A. The decision below creates a direct, intolerable conflict over an important question of bankruptcy law 11
B. Whether discharge violations are excused by good faith is a recurring question of great importance 23
C. This case is a perfect vehicle for deciding the question presented 26
D. The decision below is incorrect 27
Conclusion 31
Appendix A — Court of appeals opinion (Apr. 23, 2018) 1a
Appendix B — Court of appeals order (Sept. 7, 2018) 16a
Appendix C — Bankr. App. Panel opinion (Apr. 12, 2016) 21a
Appendix D — Bankruptcy court opinion (Dec. 16, 2014) 52a
Appendix E — Bankruptcy court opinion (Mar. 17, 2015) 65a

TABLE OF AUTHORITIES

Cases:

Alderwoods Group, Inc. v. *Garcia*, 682 F.3d 958 (11th Cir. 2012) 13
Baker Botts L.L.P. v. *ASARCO LLC*, 135 S. Ct. 2158 (2015) 25
Banco Popular, N.A. v. *Kanning*, 638 F. App'x 328 (5th Cir. 2016) 18

Page

Cases—continued:

Ben Franklin Hotel Assocs., In re, 186 F.3d 301 (3d Cir. 1999) 21, 22
Beschloss, In re, No. 15-12139, 2018 WL 2138276 (Bankr. S.D.N.Y. May 8, 2018) 20
Bessette v. *Avco Fin. Servs., Inc.*, 230 F.3d 439 (1st Cir. 2000) 4, 5, 23, 29
Butler, In re, No. 09-8101, 2011 WL 806078 (Bankr. C.D. Ill. Mar. 2, 2011) 21
Chao v. *Transocean Offshore, Inc.*, 276 F.3d 725 (5th Cir. 2002) 29
Cherry, In re, 247 B.R. 176 (Bankr. E.D. Va. 2000) 17, 30
Clark v. *Rameker*, 134 S. Ct. 2242 (2014) 25
Cochran, In re, No. 83-1393, 2000 WL 35799020 (Bankr. S.D. Iowa Aug. 8, 2000) 21
Culley, In re, 347 B.R. 115 (B.A.P. 10th Cir. 2006) 19
DiGeronimo, In re, 354 B.R. 625 (Bankr. E.D.N.Y. 2006) 21
Espinosa v. *United Student Aid Funds, Inc.*, 553 F.3d 1193 (9th Cir. 2008), aff'd, 559 U.S. 260 (2010) 5
Fina, In re, 550 F. App'x 150 (4th Cir. 2014) 17, 29, 30
Food Lion, Inc. v. *United Food & Commercial Workers Int'l Union, AFL-CIO-CLC*, 103 F.3d 1007 (D.C. Cir. 1997) 29
Grogan v. *Garner*, 498 U.S. 279 (1991) 4, 18
Hardy, In re, 97 F.3d 1384 (11th Cir. 1996) ..... *passim*
Harley-Davidson, Inc. v. *Morris*, 19 F.3d 142 (3d Cir. 1994) 29
Harris v. *Viegelahn*, 135 S. Ct. 1829 (2015) 25
Husky Int'l Elecs., Inc. v. *Ritz*, 136 S. Ct. 1581 (2016) 25
Hyman, In re, 502 F.3d 61 (2d Cir. 2007) 23
IRS v. *Murphy*, 892 F.3d 29 (1st Cir. 2018) 3, 15, 16, 24

Page

Cases—continued:

Jerman v. *Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573 (2010) 28
Jove Eng'g, Inc. v. *IRS*, 92 F.3d 1539 (11th Cir. 1996) ..... *passim*
Local Loan Co. v. *Hunt*, 292 U.S. 234 (1934) 23
Lorenzen v. *Taggert (In re Taggart)*, 888 F.3d 438 (9th Cir. 2018) ..... *passim*
Martin, In re, 474 B.R. 789 (B.A.P. 6th Cir. 2012) 18
McComb v. *Jacksonville Paper Co.*, 336 U.S. 187 (1949) ..... *passim*
McLean, In re, 794 F.3d 1313 (11th Cir. 2015) 12, 13, 31
Pratt, In re, 462 F.3d 14 (1st Cir. 2006) 14, 15
Renfrow, In re, No. 17-1027, 2017 WL 6541136 (Bankr. N.D. Okla. Dec. 20, 2017) 20
Ritchey, In re, 512 B.R. 847 (Bankr. S.D. Tex. 2014) 20
Roth, In re, 568 B.R. 139 (M.D. Fla. 2017) 13
Schwab v. *Reilly*, 560 U.S. 770 (2010) 18
SEC v. *McNamee*, 481 F.3d 451 (7th Cir. 2007) 29
Sherwood Park Bus. Ctr., LLC v. *Taggart*, 267 Or. App. 217 (Or. Ct. App. 2014) 6
Slater, In re, 573 B.R. 247 (Bankr. D. Utah 2017) 20
Taggart v. *Brown*, No. 3:12-cv-236-MO, 2012 WL 3241758 (D. Or. Aug. 6, 2012) 6
Terrebonne Fuel & Lube, Inc., In re, 108 F.3d 609 (5th Cir. 1997) 12, 30
Thal, In re, No. 09-12434-LMI, 2018 WL 2182304 (Bankr. S.D. Fla. May 9, 2018) 13
Van Winkle, In re, No. 15-01047, 2017 WL 2729069 (Bankr. D.N.M. June 23, 2017) 20
Witt, In re, No. 18-3023, 2018 WL 3966692 (Bankr. N.D. Ohio Aug. 15, 2018) 3, 20
Ybarra, In re, 424 F.3d 1018 (9th Cir. 2005) 5
Zilog, Inc., In re, 450 F.3d 996 (9th Cir. 2006) 10

Page

Constitution and statutes:

U.S. Const. Art. I, § 8, cl. 4 25
Bankruptcy Code, 11 U.S.C. 101-1532 ..... *passim*
11 U.S.C. 105(a) ..... *passim*
11 U.S.C. 524(a)(1) 23
11 U.S.C. 524(a)(2) ..... *passim*
11 U.S.C. 727(b) 4
26 U.S.C. 7433(e) 15, 16
28 U.S.C. 1254(1) 2

Miscellaneous:

2 *Collier Bankruptcy Manual* (3d rev. ed.) ¶ 524.02[2][c] 5
Elizabeth L. Gunn & Caleb Chaplain, *When Acting In Good Faith Isn't Enough: A Taxing Decision For IRS*, 37 Am. Bankr. Inst. J. 14 (Sept. 2018) 3
H.R. Rep. No. 595, 95th Cong., 1st Sess. (1977) 5
Troy A. McKenzie, *Judicial Independence, Autonomy, and the Bankruptcy Courts*, 62 Stan. L. Rev. 747 (2010) 26
Bill Rochelle, *Raising a Circuit Split, Ninth Circuit's Taggart Opinion Heads for a 'Cert' Petition*, ABI (Sept. 11, 2018) <tinyurl.com/taggartcircuitsplit> 3, 24, 25
Bill Rochelle, *Violation of Discharge Is Now Difficult to Prove in the Ninth Circuit*, ABI (Apr. 25, 2018) <tinyurl.com/ca9discharge> 24
S. Rep. No. 989, 95th Cong., 2d Sess. (1978) 5

In the Supreme Court of the United States

No.

BRADLEY WESTON TAGGART, PETITIONER

v.

SHELLEY A. LORENZEN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Bradley Weston Taggart respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-15a) is reported at 888 F.3d 438. The opinion of the bankruptcy appellate panel (App., *infra*, 21a-51a) is reported at 548 B.R. 275. The opinion of the bankruptcy court regarding contempt liability (App., *infra*, 52a-64a) is reported at 522 B.R. 627. The opinion of the bankruptcy court regarding contempt damages (App., *infra*, 65a-75a) is unreported but available at 2015 WL 1320163.

JURISDICTION

The judgment of the court of appeals was entered on April 23, 2018. A petition for rehearing was denied on September 7, 2018 (App., *infra*, 16a-20a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 524 of the Bankruptcy Code, 11 U.S.C. 524, provides in pertinent part:

> (a) A discharge in a case under this title—
>
> * * * * *
>
> (2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived * * *.

Section 105 of the Bankruptcy Code, 11 U.S.C. 105, provides in pertinent part:

> (a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

INTRODUCTION

This case presents an important and recurring question of federal bankruptcy law that has squarely divided

the lower courts. According to the Ninth Circuit, a creditor's "good faith" is sufficient to excuse a discharge violation, "even if the creditor's belief is unreasonable." In so holding, the Ninth Circuit departed from the opposite rule applied in three circuits, two bankruptcy appellate panels, and dozens of lower courts. In those courts, unlike the Ninth Circuit, a creditor who violates the discharge is liable in contempt, and the creditor's "subjective beliefs or intent" are irrelevant to that analysis.

This case easily satisfies all the traditional criteria for granting review. The conflict is obvious, acknowledged, and entrenched. It has already been recognized by multiple courts and commentators.[1] Indeed, the panel below observed at oral argument that its holding would "ineluctably create a split with the Eleventh Circuit[]," and counsel for one respondent conceded the conflict. The full Ninth Circuit refused to reconsider its position on rehearing (without any judge requesting a vote), and other circuits have maintained their contrary position for decades—including one circuit that reaffirmed its views after the Ninth Circuit's decision here. This untenable division will persist without this Court's intervention.

This case is also a perfect vehicle for resolving the conflict. The question presented was decided by all three courts below, and it was the sole basis of the Ninth Circuit's decision. Every material fact is undisputed: there is

---

[1] See, *e.g.*, *IRS* v. *Murphy*, 892 F.3d 29, 47 n.12 (1st Cir. 2018) (Lynch, J., dissenting) (flagging the conflict); *In re Witt*, No. 18-3023, 2018 WL 3966692, at *3 & n.4 (Bankr. N.D. Ohio Aug. 15, 2018) (same); Bill Rochelle, *Raising a Circuit Split, Ninth Circuit's Taggart Opinion Heads for a 'Cert' Petition*, ABI (Sept. 11, 2018) <tinyurl.com/taggartcircuitsplit> (same); Elizabeth L. Gunn & Caleb Chaplain, *When Acting In Good Faith Isn't Enough: A Taxing Decision For IRS*, 37 Am. Bankr. Inst. J. 14, 14 & nn.2-3 (Sept. 2018) (same).

no dispute that respondents acted in good faith, and one respondent even concedes the discharge was violated. The question was outcome-determinative below, and there are no conceivable obstacles to resolving it here.

And the importance of the issue is obvious. A holding that a "good faith belief, even if unreasonable, insulate[s]" creditors from contempt (App., *infra*, 13a) eviscerates the Bankruptcy Code's key mechanism for enforcing the discharge injunction and securing a debtor's fresh start. It asks innocent debtors to absorb the costs of creditor mistakes, and it deprives debtors of the essential tool for ending discharge violations and recovering their losses. Those losses are especially intolerable for debtors who have just emerged from bankruptcy, and whose finances remain in a fragile state. There is a reason that the relevant stakeholders already weighed in with multiple amicus briefs below. See C.A. Docs. 75, 78, 80.

The question presented raises legal and practical issues of surpassing importance, and its correct disposition is essential to the Code's effective administration. Because this case presents an optimal vehicle for resolving this significant issue of federal law, the petition should be granted.

STATEMENT

1. a. The "principal purpose" of the Bankruptcy Code is granting debtors a "fresh start"—"'a new opportunity in life and a clear field of future effort, unhampered by the pressure and discouragement of preexisting debt.'" *Grogan* v. *Garner*, 498 U.S. 279, 286 (1991). To achieve that objective, the Code "discharges" most pre-petition debts (*e.g.*, 11 U.S.C. 727(b)), and "enjoins" creditors from trying to collect discharged debts (*e.g.*, *Bessette* v. *Avco Fin. Servs., Inc.*, 230 F.3d 439, 444 (1st Cir. 2000)). The scope of the protection is broad and automatic: once

granted, a discharge "operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor." 11 U.S.C. 524(a)(2).

Congress designed this injunction "to give complete effect to the discharge": it "eliminate[s] any doubt concerning the effect of the discharge as a total prohibition on debt collection efforts," and "insure[s] that once a debt is discharged, the debtor will not be pressured in any way to repay it." H.R. Rep. No. 595, 95th Cong., 1st Sess. 365-366 (1977); see also S. Rep. No. 989, 95th Cong., 2d Sess. 80 (1978). The discharge, in short, "is the 'legal embodiment * * * of the fresh start.'" *In re Ybarra*, 424 F.3d 1018, 1022 (9th Cir. 2005).

b. Congress enforced these rights with Title 11's statutory contempt powers. Under 11 U.S.C. 105(a), courts may issue "any" order "necessary or appropriate" to "carry out the provisions of this title," and may "tak[e] any action or mak[e] any determination necessary or appropriate" to "enforce or implement court orders or rules." 11 U.S.C. 105(a). When the discharge is violated, Section 105 authorizes the provision of "'full remedial relief.'" *Bessette*, 230 F.3d at 445; see also *Espinosa* v. *United Student Aid Funds, Inc.*, 553 F.3d 1193, 1205 n.7 (9th Cir. 2008) ("sanctions" are authorized to "make [the debtor] whole") (citing 2 *Collier Bankruptcy Manual* (3d rev. ed.) ¶ 524.02[2][c]), aff'd, 559 U.S. 260 (2010).

2. This case's procedural history is "complex" (App., *infra*, 4a), but the few pertinent facts are straightforward. The case arises out of a business dispute over membership interests in a LLC. Respondents sued petitioner in state court for allegedly transferring petitioner's interest in the LLC without honoring the agreement's right of first refusal. On the eve of trial, petitioner filed for Chapter 7

bankruptcy. The trial was stayed, and petitioner ultimately received a discharge. *Id.* at 4a-5a.

Thereafter, petitioner, citing the discharge, sought to be dismissed from the state-court litigation. (The proceedings were otherwise going forward against petitioner's attorney, who had paid for the LLC interest.) The trial court refused, finding petitioner was a necessary party, but the parties agreed not to pursue a money judgment against him. App., *infra*, 5a-6a. After respondents prevailed at trial, however, they sought attorney's fees from petitioner, alleging that his post-bankruptcy participation in the case (which respondents themselves had demanded) fell outside the discharge injunction. *Id.* at 6a-7a.

Petitioner moved to reopen his bankruptcy case, and sought to hold respondents in contempt for violating the discharge injunction. App., *infra*, 7a. The issue was simultaneously litigated in state and federal court. After separate appeals in each system, both the state appellate court and the federal district court found that respondents had indeed violated the discharge injunction. *Id.* at 8a-9a.[2]

---

[2] The state trial court initially found that respondents' request for post-petition attorney's fees fell outside the discharge; that ruling was reversed by the Oregon court of appeals. See *Sherwood Park Bus. Ctr., LLC* v. *Taggart*, 267 Or. App. 217, 230 (Or. Ct. App. 2014) (finding petitioner "sought to extricate himself from the litigation and thereby obtain the fresh start the bankruptcy was intended to afford him"; his "minimal" actions sought "to shield himself from the continued litigation"). The bankruptcy court also found (relying in part on the state trial court's decision) that respondents' conduct fell outside the discharge; that ruling was reversed by the federal district court. *Taggart* v. *Brown*, No. 3:12-cv-236-MO, 2012 WL 3241758, at *4-*5 (D. Or. Aug. 6, 2012) (finding petitioner sought "to extricate himself from the lawsuit altogether"; his "actions were reactionary" and "in response to a potential judgment against him for attorney fees").

3. a. The bankruptcy court subsequently held respondents in contempt for their willful violation of the discharge injunction. App., *infra*, 52a-64a.

The bankruptcy court noted that discharge violations are enforced "by a motion invoking the contempt remedies allowed for in § 105(a)." App., *infra*, 55a n.5. As the court explained, a creditor's violation must be "'willful'" to qualify for sanctions, and willfulness is determined by a two-part test: "[the court] must find first, that the alleged contemnor knew that the discharge injunction applied, and second, that the alleged contemnor intended the actions that violated the discharge injunction." *Id.* at 58a.

In applying that test, the court specifically rejected respondents' assertion that a creditor's "good faith belief" forecloses liability. App., *infra*, 58a-63a; see also *id.* at 59a-60a (expressly grounding its holding in "the Eleventh Circuit's willfulness test" from *In re Hardy*, 97 F.3d 1384 (11th Cir. 1996)). As the court explained, "[w]hether the Respondents knew the discharge was 'invoked' is a simple fact-based inquiry." *Id.* at 59a. And that inquiry "does not allow for the subjective belief, good faith or otherwise," regarding whether the discharge applied. *Id.* at 59a-60a.

With respondents' good-faith defense out of the picture, the bankruptcy court easily found a "willful" violation: (i) "it is not disputed that Respondents had actual knowledge that [petitioner's] bankruptcy discharge had been entered" when they pursued post-petition fees (App., *infra*, 61a-62a); and (ii) "[t]here is no dispute in the record that [respondents] intended" the actions that violated the discharge (*id.* at 63a). The court accordingly held respondents "in contempt" for "violating [the] discharge injunction." *Id.* at 64a.

b. The bankruptcy court next determined petitioner's actual damages from the discharge violation. App., *infra*, 65a-75a. Based on testimony and evidence developed at a

hearing, the court entered an award of $5,000 for petitioner's "substantial harm in terms of his emotional distress," and an award of $105,593.71 for the fees and costs petitioner incurred as a result of the discharge violation. *Id.* at 69a, 73a.

The court also entered a $2,000 punitive-damages award for respondents' failure to timely vacate the state-court judgment hitting petitioner with post-petition fees. App., *infra*, 74a-75a. As the court explained, respondents failed to correct the problem on their own—even after their conduct was declared unlawful—and "it ultimately required an order of this court * * * to get the supplemental attorneys' fees judgment vacated." *Id.* at 75a. The court found "mild[] coercive punitive damages" were "appropriate as a sanction to insure that [petitioner's] discharge order is observed in [the] future." *Id.* at 74a-75a.

4. The bankruptcy appellate panel (BAP) reversed. App., *infra*, 21a-51a.

Like the bankruptcy court, the BAP found the key facts undisputed: respondents were aware of petitioner's discharge and intended their actions in state court (pursuing discharged attorney's fees against petitioner). App., *infra*, 36a-37a, 49a. But the BAP found the bankruptcy court applied "an incorrect legal standard" in holding respondents in contempt. *Id.* at 24a-25a.

According to the BAP, although the bankruptcy court referenced the Ninth Circuit's "correct" standard for finding a "willful[]" violation, it erred in "instead us[ing] the [Eleventh Circuit's] test from *Hardy*." App., *infra*, 36a; see also *id.* at 48a ("the bankruptcy court erred when it relied on the *Hardy* test rather than using the Ninth Circuit's test"). As the court explained, "the Ninth Circuit has crafted a strict standard" in this setting: it "requires evidence showing the alleged contemnor was aware of the discharge injunction *and* aware that it applied to his or

her claim." *Id.* at 43a-44a. The latter showing, the court continued, requires "a fact-based inquiry which implicates a party's subjective belief, even an unreasonable one." *Id.* at 44a. Accordingly, as the BAP concluded, "in order to recover for a violation of the discharge injunction, the debtor must establish the actor's subjective state of mind." *Id.* at 47a n.13.

The BAP thus held the bankruptcy court erred in declaring that respondents' "subjective or good faith beliefs were irrelevant." App., *infra*, 49a. It thus reversed the bankruptcy court and vacated the sanctions award. *Id.* at 51a.

5. a. The Ninth Circuit affirmed, holding that respondents could "[]not be held in contempt" because they believed in "good faith" that the discharge injunction was inapplicable. App., *infra*, 1a-15a.[3]

The Ninth Circuit initially noted that bankruptcy courts "may enforce the discharge injunction by holding a party in contempt for knowingly violating the discharge." App., *infra*, 10a; *id.* at 12a n.4 (recognizing Section 105(a) as the source of contempt authority). But it found the bankruptcy court applied "an incorrect rule of law" in holding respondents in contempt. *Id.* at 12a.

According to the Ninth Circuit, a creditor's "good faith belief" excuses a discharge violation, "even if the creditor's belief is unreasonable." App., *infra*, 12a. The court

---

[3] The parties had filed a series of cross-appeals, with petitioner challenging the BAP's determination that good faith precludes a sanctions award, and respondents challenging the district court's determination that they had violated the discharge. App., *infra*, 9a. As explained below, one respondent eventually conceded that the discharge injunction was violated (*id.* at 14a & n.6), and the Ninth Circuit "decline[d]" to reach the other respondents' cross-appeals due to its dispositive holding on the good-faith defense. *Id.* at 14a.

acknowledged its holding "appears to be somewhat in tension" with other decisions. *Id.* at 13a & n.5.[4] But it found itself bound by circuit precedent, "where [the circuit] stated that even an unreasonable belief that the discharge injunction did not apply to a creditor's claims would preclude a finding of contempt." *Id.* at 12a (citing *In re Zilog, Inc.*, 450 F.3d 996, 1009 n.14 (9th Cir. 2006)). As the panel understood its past authority, the circuit's decisions did not merely ask whether a creditor *knew* of a discharge, but instead whether the creditor knew "the discharge injunction [was] 'applicable'" to their claims. *Id.* at 13a. As the court concluded, "*Zilog*'s statement of the law is clear, directly addresses the question at issue in here, and is binding on this court." *Ibid.* Thus, in the Ninth Circuit, "the creditor's good faith belief that the discharge injunction does not apply to the creditor's claim precludes a finding of contempt, even if the creditor's belief is unreasonable." *Id.* at 12a.

Because the court found it uncontested that "the [c]reditors possessed a good faith belief that the discharge injunction did not apply to their claims," it concluded "their good faith belief, even if unreasonable, insulated them from a finding of contempt." App., *infra*, 13a. With that sole holding disposing of the appeal, the court declined to reach a cross-appeal by certain respondents (challenging whether the discharge injunction was indeed

---

[4] In expressly acknowledging this "tension," the panel flagged language from an earlier circuit decision articulating the legal standard for violations of the automatic stay, which the panel admitted was a direct quote from the Eleventh Circuit's decision in *Hardy*. App., *infra*, 13a. As the panel commented at oral argument, there is no doubt it understood its decision would "ineluctably" create a circuit conflict. 9th Cir. Oral Arg. Recording 27:24-27:36 <https://tinyurl.com/taggart-CA9-OA>.

violated), and reversed the sanctions award. *Id.* at 14a-15a.[5]

b. Petitioner filed a petition for rehearing, arguing that the court's decision conflicted with the decisions of multiple circuits. The full court of appeals denied rehearing without a single judge requesting a vote. App., *infra*, 16a-20a.

REASONS FOR GRANTING THE PETITION

A. The Decision Below Creates A Direct, Intolerable Conflict Over An Important Question Of Bankruptcy Law

The Ninth Circuit's decision creates a square conflict over whether a creditor's "good faith belief" precludes liability for discharge violations. App., *infra*, 12a. That decision stands directly at odds with decisions of multiple circuits, two bankruptcy appellate panels, and countless lower courts. The conflict has already been acknowledged by judges and expert commentators, and it was admitted by the panel at oral argument and effectively conceded by one respondent below. This stark division on a core bankruptcy issue is untenable. The conflict is both undeniable and entrenched, and it should be resolved by this Court.

1. The Ninth Circuit's decision conflicts with the decisions of multiple court of appeals.

a. The decision below squarely conflicts with established law in the Eleventh Circuit. In *In re Hardy*, 97 F.3d 1384 (11th Cir. 1996), the government tried to collect a

---

[5] As noted above, one respondent (Lorenzen) ultimately conceded that, in light of intervening circuit precedent, the discharge injunction was in fact violated. App., *infra*, 14a n.6. The finding of a discharge violation is now conclusive for that respondent, and the court's "good faith" holding is thus indisputably outcome-determinative. *Id.* at 14a-15a & n.6.

"discharged tax liability," and the debtor, as here, responded by seeking sanctions "for alleged violations of the discharge injunction of § 524." 97 F.3d at 1387.

On appeal, the Eleventh Circuit held that Section 105 authorizes relief for discharge violations, irrespective of a creditor's good faith: "'the focus of the court's inquiry in civil contempt proceedings is not on the subjective beliefs or intent of the alleged contemnors in complying with the order, but whether in fact their conduct complied with the order at issue.'" 97 F.3d at 1390. Although sanctions "under a court's *inherent* powers" may require "'bad faith'" (*ibid.*) (emphasis added)),[6] the court explained that the threshold is lower for Section 105's "statutory contempt": the creditor need only (i) be "aware of the discharge injunction," and (ii) have "intended the actions" that violated it. *Ibid.* (adopting the analogous "two-pronged test" for "determin[ing] willfulness in violating [Section 362's] automatic stay").

The government was accordingly exposed to "contempt under § 105" without regard to its subjective intent: "If the court on remand finds, as the plaintiff claims, that [the government] received notice of [the debtor's] discharge in bankruptcy, and was thus aware of the discharge injunction, [the debtor] will then have to prove *only* that [the government] intended the actions which violated the [discharge]." 97 F.3d at 1390-1391 (emphasis

---

[6] Section 105's statutory powers are independent of a court's inherent contempt authority. See, *e.g.*, *Jove Eng'g, Inc.* v. *IRS*, 92 F.3d 1539, 1554 (11th Cir. 1996); see also, *e.g.*, *In re Terrebonne Fuel & Lube, Inc.*, 108 F.3d 609, 612-613 (5th Cir. 1997). Under Section 105, "Congress has empowered bankruptcy courts broadly to 'issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of' the Bankruptcy Code," "including sanctions to enforce the discharge injunction." *In re McLean*, 794 F.3d 1313, 1320 (11th Cir. 2015).

added). Under the court's holding, good faith was irrelevant to the analysis. *Id.* at 1390.

Hardy has been settled law in the Eleventh Circuit for over two decades. Accordingly, unlike in the Ninth Circuit, "to find contempt, the bankruptcy court needed only to find that [the creditor] was aware of the discharge injunction and intended the action that violated it." *In re McLean*, 794 F.3d 1313, 1323 (11th Cir. 2015) (citing *Hardy*, 97 F.3d at 1390); accord *Alderwoods Group, Inc.* v. *Garcia*, 682 F.3d 958, 967 n.18 (11th Cir. 2012) (cabining "bad faith" to "contempt under the court's inherent powers," not statutory "contempt under § 105") (citing *Hardy*, 97 F.3d at 1390). In direct conflict with the decision below, "[t]he subjective beliefs or intent of the creditor are irrelevant." *In re Roth*, 568 B.R. 139, 142 (M.D. Fla. 2017) (citing *Hardy*, 97 F.3d at 1390); see also, *e.g.*, *In re Thal*, No. 09-12434-LMI, 2018 WL 2182304, at *3 (Bankr. S.D. Fla. May 9, 2018) ("not knowing that the [collection attempt] was a violation does not excuse the IRS's intentional violation of the discharge injunction") (citing *Hardy*, 97 F.3d at 1390); *Roth*, 568 B.R. at 146 (the creditor's "intent * * * is irrelevant to the court's determination of whether its conduct was a willful violation of the discharge order").

Nor did the Ninth Circuit create this conflict by accident. The decision below expressly acknowledged the "tension" between its holding and *Hardy* (see App., *infra*, 13a & n.5), and the panel recognized at oral argument that "adopting" its position would "ineluctably cause there to be a split between the Ninth Circuit and the Eleventh Circuit[]." 9th Cir. Oral Arg. Recording 27:24-27:36 <https://tinyurl.com/taggart-CA9-OA>. In response to this admission, counsel for one of the respondents conceded the Ninth Circuit has indeed "adopted a different test than *Hardy*." *Id.* at 27:40-27:50.

b. The Ninth Circuit's decision also directly conflicts with settled law in the First Circuit. In *In re Pratt*, 462 F.3d 14 (1st Cir. 2006), the debtors, as here, moved to reopen their bankruptcy case to seek relief for a discharge violation. See 462 F.3d at 16.

The First Circuit initially stressed the "important federal interest" in protecting the debtors' "'fresh start,'" and affirmed the statutory authority "'to invoke § 105 to enforce the discharge injunction imposed by § 524.'" 462 F.3d at 17, 19. In confronting the question presented here, the First Circuit held that the creditor's violation was actionable despite the lack of "bad faith." *Id.* at 19-21. The court explained that it had already "rejected the proposition that a stay violation could not be actionable (*viz.*, 'willful') if the creditor had made a good faith mistake," and instead held that "'the standard for a willful violation'" is met "'if there is knowledge of the stay and the defendant intended the actions which constituted the violation.'" *Id.* at 21. Applying that same standard in the discharge setting, the court held that the creditors' "presum[ptive]" lack of "bad faith" (*id.* at 20) was irrelevant:

> [The creditor] has not suggested—nor could it plausibly do so on these record facts—that it did not know of the existence of the [debtors'] chapter 7 discharge, or that it did not intend to [engage in the actionable conduct]. Given the clarity of the present record as to both the "notice" and "general intent" elements, therefore, we conclude that the [debtors] adduced sufficient evidence that [the creditor's] violation of the discharge injunction was "willful."

Id. at 20-21. Thus, despite finding no "evidence that [the creditor] acted in bad faith," the court held that the debtors were "entitled to establish and recover their compensatory damages, together with other appropriate relief under Bankruptcy Code § 105(a)." *Id.* at 20. That holding

is directly at odds with the Ninth Circuit's decision. App., *infra*, 12a (finding that a creditor's "good faith * * * precludes a finding of contempt").

The First Circuit reaffirmed *Pratt* in *IRS* v. *Murphy*, 892 F.3d 29 (1st Cir. 2018), a case decided after the decision below. As *Murphy* explained, in the First Circuit, unlike the Ninth Circuit, there is no "'good faith'" defense for discharge violations. 892 F.3d at 40 (citing *Pratt*, 462 F.3d at 21). It also found this rule was "established" for decades: under settled law, when courts "evalut[e] violations of both automatic stays and discharge orders," "[a] good faith belief in a right to the property" is "not relevant to determining whether the creditor's violation was willful." *Id.* at 38-39; see also *ibid.* (citing, inter alia, the Eleventh Circuit's *Hardy* decision, and explaining that "bankruptcy courts from outside the Eleventh Circuit followed its lead").[7]

The First Circuit also noted this rule was supported by "compelling policy justifications." 892 F.3d at 41. It explained that "discharge orders 'ensure that debtors receive a "fresh start" and are not unfairly coerced into repaying discharged prepetition debts,'" important objectives that would be frustrated if "good faith" creditors are let off the hook. *Ibid.* And it noted that creditors had little excuse for violating the injunction: "[i]f [a creditor] found

---

[7] The First Circuit retraced the liability standards for discharge violations to determine the proper interpretation of 26 U.S.C. 7433(e), which authorizes "damages" where IRS employees "willfully violate[]" the discharge injunction. Based on its review of settled law, the court concluded that "'willful violation' had an established meaning in 1998 [when Section 7433(e) was enacted] and that Congress used that established meaning in § 7433(e) to set the standard for evaluating violations of both automatic stays and discharge orders." 892 F.3d at 39. The court further concluded that "post-1998 decisions * * * confirm that the generally accepted definition of willful violation should control." *Id.* at 39-40 (citing, inter alia, *Pratt*, 462 F.3d at 21).

the[] discharge order ambiguous," it always had "a variety of processes available" to "determine whether [the debtor's] obligations had been discharged." *Id.* at 41-42. Finally, it explained that a contrary rule would render a debtor's legal protections "a near nullity": if a creditor "encounters no risk" for pursuing discharged debts "as long as it has a 'good faith' or 'reasonable belief' for its conclusions," "it is hard to imagine a case where a [debtor] could ever collect * * * for a violation of the automatic stay or discharge order." *Id.* at 42.

Judge Lynch dissented from the majority's construction of Section 7433(e). 892 F.3d at 43. In doing so, she expressly acknowledged the conflict created by the Ninth Circuit's decision below: "[T]here is no consensus on the definition of 'willful' in the § 524 discharge injunction context." *Id.* at 47 n.12 (Lynch, J., dissenting). As Judge Lynch explained, unlike other courts, "[t]he Ninth Circuit has held that a good faith belief that one is not violating a discharge injunction is sufficient to show that there was no 'willful violation' of the discharge injunction. * * * Indeed, the Ninth Circuit does not even impose a reasonableness requirement." *Ibid.* (citing *Lorenzen* v. *Taggert (In re Taggart)*, 888 F.3d 438, 444 (9th Cir. 2018) (App., *infra*, 12a-13a)); see also *id.* at 47 n.11 (acknowledging that the Eleventh Circuit adopted the opposite rule in *Hardy*).

Murphy thus not only cements the obvious conflict between the Ninth Circuit and First Circuit, but confirms that the conflict is both open and entrenched.[8]

---

[8] At the rehearing stage, petitioner filed a letter under Fed. R. App. P. 28(j) calling the Ninth Circuit's attention to *Murphy*. As noted earlier, the full Court denied rehearing without a single judge calling for a vote on the petition.

c. The Fourth Circuit in *In re Fina*, 550 F. App'x 150 (4th Cir. 2014) (per curiam), likewise endorsed the approach of other circuits and rejected the Ninth Circuit's position: "'In a civil contempt proceeding, the state of mind with which the contemnor violated a court order is irrelevant and therefore good faith, or the absence of an intent to violate the order, is no defense.'" 550 F. App'x at 154 (quoting *In re Cherry*, 247 B.R. 176, 187 (Bankr. E.D. Va. 2000)). In short, "'[t]he focus of the court's inquiry * * * is not on the subjective beliefs or intent of the alleged contemnors in complying with the order, but whether in fact their conduct complied with the order at issue.'" *Id.* at 155 (quoting *Hardy*, 97 F.3d at 1390).

In *Fina*, as here, a chapter 7 debtor sought to hold creditors in contempt for engaging in state-court litigation in violation of the discharge injunction. 550 F. App'x at 153-154. On appeal, the Fourth Circuit held that "contempt sanctions" in the discharge context are controlled by a "two-part test": "(1) whether the creditor violated the injunction, and (2) whether he or she did so willfully." *Id.* at 154 (citing, *e.g.*, *Hardy*, 97 F.3d at 1390). As the court explained, "[t]he willfulness prong requires only that the acts taken in violation of the injunction be intentional. In other words, a good faith mistake is generally not a valid defense." *Ibid.* Applying that standard, the court held that the creditors had willfully violated the discharge: there was "no dispute that the [creditors] and their counsel were aware of the injunction at the time they filed the amended [state-court] complaint," which "is sufficient to establish that the violation was willful." *Id.* at 155. In contrast to the Ninth Circuit, the Fourth Circuit held that the

creditors' "intentions and their apparent attempts to comply with the law are irrelevant." *Ibid.*[9]

2. The Ninth Circuit's decision is also irreconcilable with the decisions of two bankruptcy appellate panels.[10]

First, in *In re Martin*, 474 B.R. 789 (B.A.P. 6th Cir. 2012) (unpublished), the court reviewed a sanctions award against a creditor for "violating the debtor's discharge injunction." 474 B.R. at *1. The court explained that sanctions were authorized if "the creditor's actions were willful, '*i.e.*, whether the creditor deliberately acted with [actual] knowledge of the bankruptcy case.'" *Id.* at *6. Unlike the Ninth Circuit, the court specifically held that "[a] creditor's mistaken belief as to the validity of its actions is not a defense." *Id.* at *10. On the contrary, "'[a] willful violation of the * * * discharge injunction may still exist even though the creditor believed in good faith that its actions were lawful.'" *Id.* at *6.

Applying that standard, the court noted that "Section 524(a)(2) specifically enjoins a creditor from filing a lawsuit to collect a discharged debt as a personal liability of the debtor." 474 B.R. at *10. Because the creditor there had filed suit in state court despite knowing the debtor

---

[9] The Fifth Circuit has likewise adopted the same legal standard without any hint that "subjective intent" has a role in the analysis: "To show a willful violation of her discharge, [the debtor] must show [the creditor] both knew about, and intended the actions that violated, the discharge." *Banco Popular, N.A.* v. *Kanning*, 638 F. App'x 328, 342 (5th Cir. 2016) (citing *Hardy*, 97 F.3d at 1390). Unlike the Ninth Circuit, the Fifth Circuit did not ask whether the creditor was aware that its conduct would indeed *violate* the discharge or suggest "good faith" would "insulate[]" a violation. Contra App., *infra*, 13a.

[10] This Court routinely considers decisions of bankruptcy appellate panels in describing conflicts warranting the Court's review. See, *e.g.*, *Schwab* v. *Reilly*, 560 U.S. 770, 778 & n.4 (2010); *Grogan* v. *Garner*, 498 U.S. 279, 283 & n.7 (1991).

had "received a chapter 7 discharge," the court found contempt was appropriate: the creditor's "mistaken belief that his actions were somehow outside the scope of § 524(a)(2)" does not excuse the violation. *Ibid.* As the court explained, the "[d]ebtor clearly suffered injuries as a result of [the creditor's] state court lawsuit. She had to not only take action in state court, but also in the bankruptcy court in order to protect herself." *Ibid.* Indeed, the court found, "[t]his case appears to be a classic situation in which an award of attorney's fees was 'necessary to effectuate the purposes of the discharge injunction.'" *Ibid.* The court's rationale and disposition cannot be squared with the Ninth Circuit's opposite holding below.

Second, in *In re Culley*, 347 B.R. 115 (B.A.P. 10th Cir. 2006) (unpublished), the court likewise held that good faith is irrelevant, again rejecting the Ninth Circuit's position: a creditor's "state of mind is not relevant to whether his actions violated the discharge injunction." 347 B.R. at *4. The court thus upheld the bankruptcy court's contempt finding because the creditor's violation was "willful": "'Willful' connotes conduct that was 'volitional and deliberate' as opposed to unintentional or accidental." *Ibid.* As the court explained, it was enough that the creditor "filed the [state-court] collection action knowing [the debtor] had filed bankruptcy." *Ibid.* Unlike the Ninth Circuit, the Tenth Circuit BAP rejected that the creditor's "state of mind mattered," whether his conduct was " reasonable" or otherwise. *Id.* at *3-*4.

3. Dozens of lower courts from jurisdictions nationwide have reached the same conclusion. Indeed, in unambiguous terms, these courts confronted the identical question as the Ninth Circuit and adopted the opposite legal standard:

- "bankruptcy courts in the Sixth Circuit routinely hold that an alleged contemnor's subjective good faith belief that its actions did not violate the discharge is not a defense in a contempt action" (*In re Witt*, No. 18-3023, 2018 WL 3966692, at *3 & n.4 (Bankr. N.D. Ohio Aug. 15, 2018) (also expressly recognizing conflict with the Ninth Circuit's "contrast[ing]" authority));
- "'under prevailing precedent, "the state of mind with which the contemnor violated the court order is irrelevant and therefore good faith, or the absence of intent to violate the order is no defense"'" (*In re Beschloss*, No. 15-12139, 2018 WL 2138276, at *5 & n.1 (Bankr. S.D.N.Y. May 8, 2018));
- "a debtor need not prove that the defendant subjectively intended to violate the discharge"; "the creditor's good faith is not relevant to determining whether [the] act violated the discharge injunction" (*In re Renfrow*, No. 17-1027, 2017 WL 6541136, at *3 & n.19 (Bankr. N.D. Okla. Dec. 20, 2017));
- "'[a] willful violation [of § 524(a)] does not require any specific intent'"; "'[a] creditor's mistaken belief that its actions were lawful or did not violate § 524(a) is not a defense to a contempt action'" (*In re Van Winkle*, No. 15-01047, 2017 WL 2729069, at *4-*5 (Bankr. D.N.M. June 23, 2017));
- "[c]ourts have found that a creditor's good faith is not relevant when deciding whether there was a violation of §§ 362 or 524" (*In re Slater*, 573 B.R. 247, 256 (Bankr. D. Utah 2017));
- "'[t]he state of mind of the party at the time the party violates the court's order is irrelevant as to a finding of contempt'"; "there is no affirmative defense of bona fide error for violation of discharge injunction actions" (*In re Ritchey*, 512 B.R. 847, 858-859 (Bankr. S.D. Tex. 2014));

- "[a] creditor may be found in contempt if it (a) knew of the discharge and (b) intended the actions that violated the discharge"; "[i]f a creditor's conduct violates the injunction, good faith is no defense" (*In re Butler*, No. 09-8101, 2011 WL 806078, at *9 (Bankr. C.D. Ill. Mar. 2, 2011) (citing, *e.g.*, *Hardy*, 97 F.3d at 1390));
- "[a] mistaken belief that the debt at issue was not discharged (or was reaffirmed) does not negate a finding that a creditor willfully violated the discharge injunction" (*In re DiGeronimo*, 354 B.R. 625, 642-643 (Bankr. E.D.N.Y. 2006)); and
- "[b]ecause civil contempt is remedial in nature, the subjective intent of the alleged offender in doing the act is unimportant"; "the debtor must show that the defendant knew of the order and knowingly committed the offending act" (*In re Cochran*, No. 83-1393, 2000 WL 35799020, at *4 (Bankr. S.D. Iowa Aug. 8, 2000) (citing *Hardy*, 97 F.3d at 1390)).

These lower-court decisions overwhelmingly reject the proposition that subjective intent excuses a discharge violation. That consistent view is impossible to square with the Ninth Circuit's conflicting rule that a "good faith belief, even if unreasonable, insulate[s] [creditors] from a finding of contempt." App., *infra*, 13a.

4. At the rehearing stage below, one of the respondents argued that the Ninth Circuit does not "stand[] alone" in holding that "good faith" precludes liability. C.A. Doc. 83, at 2. According to respondent, the Third Circuit "also recognize[s] that a party's 'colorable argument' that its claim had not been discharged freed it from contempt for violating the discharge injunction." *Ibid.* (quoting *In re Ben Franklin Hotel Assocs.*, 186 F.3d 301, 309 (3d Cir. 1999)).

This assertion is twice curious. First, even if correct, it would only confirm the existence of a *deeper* circuit conflict (3-2) on an important and recurring question of bankruptcy law. That supports, not diminishes, the need for this Court's immediate review.

In any event, the Third Circuit's so-called "holding" came in a single paragraph at the tail end of the court's opinion; it did not include any supporting rationale or citations, and it did not refute (or even acknowledge) the opposite rule faithfully applied by multiple courts of appeals, two bankruptcy appellate panels, and dozens of lower courts. See *Ben Franklin*, 186 F.3d at 309. On the contrary, the Third Circuit held that the bankruptcy court did not "abuse [its] discretion" in declining contempt in light of the "unusual facts" before it. *Ibid.* The Ninth Circuit deliberately departed from the unambiguous rule applied in other circuits; the Third Circuit's decision, at most, reinforces the case for certiorari.

* * *

This conflict is indisputable and entrenched, and it is ripe for the Court's review. The Ninth Circuit squarely held that "good faith" precludes contempt liability for discharge violations; multiple courts of appeals (and dozens of lower courts) have reached the opposite conclusion, some now for decades. The Ninth Circuit recognized it was bound by circuit precedent, and it acknowledged its view would "ineluctably" create a circuit conflict. Yet on rehearing, the full court was presented with contrary authority, and it denied rehearing without a single judge requesting a vote. The First Circuit, in turn, has since recognized the conflict and reaffirmed the majority position. The split is entrenched.

These issues have been fully ventilated, and there is no realistic prospect that either side of the split will back down. The conflict over this important issue will persist

until this Court intervenes. Further review is plainly warranted.

B. Whether Discharge Violations Are Excused By Good Faith Is A Recurring Question Of Great Importance

The legal and practical importance of this case is difficult to overstate. It presents a clear, entrenched conflict on a significant legal question that arises repeatedly in bankruptcies nationwide. The Ninth Circuit's holding frustrates the Code's effective administration, and invites intolerable confusion in an area that demands uniformity. The issue will continue generating conflicts and uncertainty until this Court provides a definitive answer. Certiorari is warranted.

1. A "primary purpose[]" of bankruptcy is to "'relieve the honest debtor from the weight of oppressive indebtedness, and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes.'" *Local Loan Co.* v. *Hunt*, 292 U.S. 234, 244 (1934). The Code's discharge injunction is essential to securing that fresh start. It is the single tool that best protects debtors as they seek to rebuild from financial misfortune and avoid the financial stress that drove them into bankruptcy. *In re Hyman*, 502 F.3d 61, 66 (2d Cir. 2007). Its protection is so fundamental that Congress declared acts that violate the discharge "void[]" (11 U.S.C. 524(a)(1))—not merely voidable—and courts recognize broad authority to redress violations with "'full remedial relief'" (*Bessette*, 230 F.3d at 445).

The Ninth Circuit's decision debilitates these core protections. Under its holding, the cost of a creditor's good-faith mistake comes out of the debtor's pocket. Yet there is no basis for asking debtors to absorb the costs of a *creditor's* error. Debtors are a sensitive class. They often emerge from bankruptcy in a fragile economic state. The

loss of even a few hundred dollars can mean the difference between buying food and clothes for their families or struggling to meet basic needs. The correct incentive holds creditors accountable for their own misconduct, rather than shift those costs to innocent debtors who did nothing wrong. *Jove*, 92 F.3d at 1555-1556 (even "'inadvertent'" violations "cause[] actual and necessary extra expense to [the debtor]," and the "burden" must not "be shifted to [the debtor] or [its] counsel").

The Ninth Circuit's rule also "gives creditors license to disregard discharge injunctions" with "pretextual arguments," making contempt "difficult to prove in the Ninth Circuit." Bill Rochelle, *Violation of Discharge Is Now Difficult to Prove in the Ninth Circuit*, ABI (Apr. 25, 2018) <tinyurl.com/ca9discharge>; see also *Murphy*, 892 F.3d at 42 (if "good faith" excuses a discharge violation, "it is hard to imagine a case where a taxpayer could ever collect against the government").

It is not difficult for sophisticated, aggressive, well-funded creditors to conjure up pretextual reasons for pushing the discharge's limits. But it *is* difficult to expose a pretext for what it truly is. An examination into a creditor's state of mind requires hearings and testimony, and it imposes substantial costs on both parties and courts. Few attorneys will take such cases on contingency, and debtors can scarcely afford to pay for counsel on the heels of a bankruptcy. The result leaves debtors defenseless against even "unreasonable" behavior: "there is little to deter stay violations without the threat of contempt, and debtors may not be able to afford counsel to enforce their protections if contempt sanctions are generally unavailable." Bill Rochelle, *Raising a Circuit Split, Ninth Circuit's Taggart Opinion Heads for a 'Cert' Petition*, ABI (Sept. 11, 2018) <tinyurl.com/taggartcircuitsplit> (Rochelle).

Under the standard applied outside the Ninth Circuit, Section 105 serves its intended function as an essential remedial device and necessary deterrent. The Ninth Circuit's contrary decision undermines those critical objectives, wasting time and resources in a system that requires efficiency. "[G]iven the centrality of discharge * * * in the bankruptcy system," the "importance of resolving the circuit split" is obvious. Rochelle, *supra*.

2. Review is also essential to ensure the Code's effective administration. There is an overriding (even *constitutional*) importance of achieving national "uniform[ity]" in the bankruptcy context. U.S. Const. Art. I, § 8, cl. 4. For that reason, this Court routinely grants review to resolve even shallow conflicts over the interpretation or application of the Bankruptcy Code. See, *e.g.*, *Husky Int'l Elecs., Inc.* v. *Ritz*, 136 S. Ct. 1581 (2016) (2-1 split); *Baker Botts L.L.P.* v. *ASARCO LLC*, 135 S. Ct. 2158, 2163 (2015) (1-1 split); *Harris* v. *Viegelahn*, 135 S. Ct. 1829, 1836 (2015) (1-1 split); *Clark* v. *Rameker*, 134 S. Ct. 2242, 2246 (2014) (1-1 split). The existence of a *deeper* conflict here is undeniable: petitioner would have prevailed had these proceedings occurred in Florida, Ohio, Massachusetts, or Virginia, but he lost due to the happenstance that his bankruptcy case arose in Oregon. A debtor's rights under the Code should not be determined by geography. Given the constitutional and practical interests in clarity and uniformity, the existing conflict is particularly intolerable.

3. The conflict is also ripe for the Court's review. The competing arguments on each side have been ventilated and additional percolation would prove pointless. "Good faith" is either dispositive or irrelevant in establishing contempt; one view of the legal standard is correct and the other is wrong, and the debtor's discharge hangs in the balance. This untenable split will remain unresolved without this Court's intervention.

And it is unclear when the Court will find another opportunity to correct the Ninth Circuit's mistake. Bankruptcy appeals rarely reach the circuit level, despite raising important and recurring issues. Troy A. McKenzie, *Judicial Independence, Autonomy, and the Bankruptcy Courts*, 62 Stan. L. Rev. 747, 782 (2010) ("The nature of bankruptcy cases tends to discourage further appellate review in the Article III courts because of the twin concerns of delay and cost associated with prolonged litigation."). Few litigants find enough at stake to litigate in bankruptcy court and continue all the way through the appellate process. This is the unusual case where the question is directly presented at this advanced stage.

The decision below upsets Congress's scheme, cements a circuit conflict, and eliminates essential protections for vulnerable debtors. The issue has been carefully considered by multiple courts of appeals, and the conflict is not going anywhere. This Court alone can provide a clean answer. The issue cries out for the Court's review.

C. This Case Is A Perfect Vehicle For Deciding The Question Presented

This case is an ideal vehicle for deciding this significant question. The dispute turns on a pure question of law. It was squarely raised and resolved at each stage below, and all three courts (the bankruptcy court, the BAP, and the Ninth Circuit) thoroughly addressed the question and treated it as dispositive. Nor is there any doubt that this issue was outcome-determinative. The Ninth Circuit's clear holding—"good faith" precludes contempt—was the sole basis of its decision. The bankruptcy court applied the majority standard (from the Eleventh Circuit's *Hardy* decision) and petitioner won; the BAP and the Ninth Circuit applied the opposite standard and petitioner lost. The stark division over this fundamental legal issue drives the decision.

Nor are there any factual or procedural impediments to resolving the question presented. The relevant facts are undisputed and directly implicate the circuit conflict: It is uncontested that respondents acted in good faith, were aware of petitioner's discharge, and acted intentionally in state court. Indeed, one respondent (Lorenzen) has since conceded *that the discharge was violated*, leaving the good-faith defense as the sole remaining issue in dispute. App., *infra*, 14a n.6.

Petitioner would have prevailed under the established majority rule (applied in the First, Fourth, and Eleventh Circuits, the bankruptcy appellate panels in the Sixth and Tenth Circuits, and countless lower courts nationwide), but instead lost because the case arose in the Ninth Circuit. This clean presentation is the perfect backdrop for deciding this important "rule of law." App., *infra*, 12a.

D. The Decision Below Is Incorrect

Review is also warranted because the Ninth Circuit's decision is wrong.

First, the decision contradicts bedrock contempt principles. As this Court has long held, good faith "does not relieve from civil contempt." *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949). Unlike its criminal counterpart, civil contempt is designed "to enforce compliance with an order of the court or *to compensate for losses or damages sustained by reason of noncompliance.*" *Ibid.* (emphasis added). Because its "purpose is remedial, it matters not with what intent the defendant did the prohibited act." *Ibid.*; accord *Jove*, 92 F.3d at 1555. Any violation, innocent or otherwise, still defeats the law's protec-

tions and causes harm. Sanctions are authorized to remedy those harms, even if the wrongdoer "had no purpose to evade the decree." *McComb*, 336 U.S. at 193.[11]

The Ninth Circuit's rationale conflicts with this controlling authority. As with any other decree, the Code's discharge injunction is "fashioned" to grant benefits to a protected class, and those benefits are not "dependent on the [violator's] state of mind." *McComb*, 336 U.S. at 191. Congress "laid on [creditors] a duty to obey specified provisions of the statute"—including the discharge—and "[a]n act does not cease to be a violation * * * merely because it may have been done innocently." *Ibid.* A rule "insulat[ing]" good-faith creditors from contempt (App., *infra*, 13a) wrongly eliminates the Code's "benefits" and shifts the costs of non-compliance to the very class the law is designed to protect. *McComb*, 336 U.S. at 191.

These longstanding remedial principles are also fair. Anyone aware of the discharge is also aware of "the risk of crossing the forbidden line." *McComb*, 336 U.S. at 193. Where, as here, "the aim is remedial and not punitive, there can be no complaint that the burden of any uncertainty in the decree is on [the violator's] shoulders." *Ibid.*; *Jove*, 92 F.3d at 1557. "They took a calculated risk when under the threat of contempt they adopted measures designed to avoid the legal consequences of the Act." *McComb*, 336 U.S. at 193. Instead of seeking preclearance from the bankruptcy court, "they acted at their peril." *Id.* at 192. It thus is entirely appropriate to order creditors

---

[11] Cf. *Jerman* v. *Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 581-583 (2010) ("We have long recognized the 'common maxim, familiar to all minds, that ignorance of the law will not excuse any person, either civilly or criminally.' * * * Our law is therefore no stranger to the possibility that an act may be 'intentional' for purposes of civil liability, even if the actor lacked actual knowledge that her conduct violated the law.").

"to pay the damages caused by their violations of the decree" (*ibid.*), whether acting in "good faith" or not. *Fina*, 550 F. App'x at 154 (citing *Hardy*, 97 F.3d at 1390); see also *Chao* v. *Transocean Offshore, Inc.*, 276 F.3d 725, 728 (5th Cir. 2002) ("Good faith is not a defense to civil contempt; the question is whether the alleged contemnor complied with the court's order."). The Ninth Circuit cannot square its contrary position with these established principles.[12]

Second, Section 105 textually authorizes courts to enforce specific orders under the Code, including the discharge injunction. See 11 U.S.C. 105(a) ("The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."); see also *Bennett*, 298 F.3d at 1069 (so holding).

The discharge injunction is designed to eliminate all banned collection attempts, including the costs of resisting those attempts. When a creditor violates the injunction, a contempt award is both "necessary" and "appropriate" to restore the status quo ante, which effectuates Section 524(a)'s directives. *Bessette*, 230 F.3d at 444-445; accord *Dyer*, 322 F.3d at 1193; *Jove*, 92 F.3d at 1554. Otherwise debtors are left covering the costs of correcting the creditor's mistake, leaving them in a worse condition than

---

[12] Other courts have applied *McComb* in an identical fashion in a multitude of non-bankruptcy settings. *E.g.*, *SEC* v. *McNamee*, 481 F.3d 451, 455-456 (7th Cir. 2007) ("*scienter* is not required in civil-contempt proceedings"); *Food Lion, Inc.* v. *United Food & Commercial Workers Int'l Union, AFL-CIO-CLC*, 103 F.3d 1007, 1016 (D.C. Cir. 1997) ("[A] finding of bad faith on the part of the contemnor is *not* required. Indeed, the law is clear in this circuit that 'the [contemnor's] failure to comply with the court decree need not be intentional'"); accord *Harley-Davidson, Inc.* v. *Morris*, 19 F.3d 142, 148-149 (3d Cir. 1994). There is no reason to think *McComb*'s logic somehow loses its force in the bankruptcy context alone.

their proper baseline under the Code. See, *e.g.*, *McComb*, 336 U.S. at 191.

Good faith is irrelevant to these objectives. The contempt question is binary: the discharge injunction was either violated or it was not. Every uncompensated violation chips away at the debtor's rights and undermines the Code, irrespective of the creditor's intent. See *Fina*, 550 F. App'x at 156 (the debtor "had to defend the lawsuit himself," generating "a financial cost that interfered with his right to a fresh economic start"). Compensatory relief is thus necessary to "carry out the provisions of this title" by "enforc[ing] [and] implement[ing]" the discharge injunction (11 U.S.C. 105(a)). See, *e.g.*, *Terrebonne Fuel*, 108 F.3d at 613. There is no textual hook precluding the Code's operation where a creditor acts in good faith.

Third, the Ninth Circuit's decision is at odds with the Code's purpose. Congress granted debtors a fresh start, and it did not indicate any desire to stick debtors with the cost of creditor error. *Cherry*, 247 B.R. at 189 n.20. Creditors are in a better position to pay for the harm they wrongfully inflict (even by accident); there is no reason to let a good-faith creditor off the hook only to ask a *good-faith debtor* to suffer the consequences.

Moreover, creditors have little excuse for any mistake: they have the ability to seek declaratory relief *before* acting, thereby avoiding harm in the first place. *Fina*, 550 F. App'x at 156 ("As the bankruptcy judge noted in this case, he is routinely asked to consider such modifications to discharge injunctions, and he routinely grants them. The proper course for the appellants was to first seek leave of the bankruptcy court before pursuing judgment against the debtor."); see *McComb*, 336 U.S. at 192-193. If creditors decide to roll the dice, they alone should pay the costs of their miscalculations. *Jove*, 92 F.3d at 1557.

Section 105 protects the "fresh start" and deters misconduct. *McLean*, 794 F.3d at 1320; see *McComb*, 336 U.S. at 194. The Ninth Circuit eroded this essential tool for enforcing the Code, and immediate review is warranted to correct the court's mistake.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

JOHN M. BERMAN
7175 SW Beveland St., Ste. 210
Tigard, OR 97223

DANIEL L. GEYSER
Counsel of Record
GEYSER P.C.
One Energy Square
4925 Greenville Ave., Ste. 200
Dallas, TX 75206
(214) 800-2660
daniel.geyser@geyserpc.com

OCTOBER 2018

APPENDIX

TABLE OF CONTENTS

Appendix A: Court of appeals opinion, Apr. 23, 2018 ..... 1a

Appendix B: Court of appeals order, Sept. 7, 2018 ..... 16a

Appendix C: Bankruptcy appellate panel opinion, Apr. 12, 2016 ..... 21a

Appendix D: Bankruptcy court opinion regarding contempt liability, Dec. 16, 2014 ..... 52a

Appendix E: Bankruptcy court opinion regarding contempt damages, Mar. 17, 2015 ..... 65a

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 16-35402

In re BRADLEY WESTON TAGGART,
Debtor,

SHELLEY A. LORENZEN, Executor of Estate of Stuart Brown; TERRY W. EMMERT; KEITH JEHNKE; SHERWOOD PARK BUSINESS CENTER, LLC,
Appellants,

v.

BRADLEY WESTON TAGGART,
Appellee.

No. 16-60032

In re BRADLEY WESTON TAGGART,
Debtor,

BRADLEY WESTON TAGGART,
Appellant,

v.

SHELLEY A. LORENZEN, Executor of Estate of Stuart Brown; TERRY W. EMMERT; KEITH JEHNKE; SHERWOOD PARK BUSINESS CENTER, LLC,
Appellees.

No. 16-60033

In re BRADLEY WESTON TAGGART,
Debtor,

BRADLEY WESTON TAGGART,
Appellant,

v.

TERRY W. EMMERT; KEITH JEHNKE; SHERWOOD PARK BUSINESS CENTER, LLC; SHELLEY A. LORENZEN, Executor of Estate of Stuart Brown
Appellees.

No. 16-60039

In re BRADLEY WESTON TAGGART,
Debtor,

SHELLEY A. LORENZEN, Executor of Estate of Stuart Brown,
Appellant,

v.

BRADLEY WESTON TAGGART,
Appellee.

No. 16-60040

In re BRADLEY WESTON TAGGART,
Debtor,

TERRY W. EMMERT; KEITH JEHNKE;
SHERWOOD PARK BUSINESS CENTER, LLC,
Appellants,

v.

BRADLEY WESTON TAGGART,
Appellee.

No. 16-60042

In re BRADLEY WESTON TAGGART,
Debtor,

SHELLEY A. LORENZEN, Executor of Estate of
Stuart Brown,
Appellant,

v.

BRADLEY WESTON TAGGART,
Appellee.

No. 16-60043

In re BRADLEY WESTON TAGGART,
Debtor,

TERRY W. EMMERT; KEITH JEHNKE;
SHERWOOD PARK BUSINESS CENTER, LLC,
Appellants,

v.

BRADLEY WESTON TAGGART,
Appellee.

Filed: April 23, 2018

Before EDWARD LEAVY, RICHARD A. PAEZ, and CARLOS T. BEA, Circuit Judges.

OPINION

BEA, Circuit Judge:

This case arises out of a complex set of bankruptcy proceedings. Appellant Bradley Taggart was a real estate developer who owned a 25% interest in Sherwood Park Business Center, LLC ("SPBC"). Appellees and Cross-Appellants Terry Emmert and Keith Jehnke also each

owned a 25% interest in SPBC. In 2007, Taggart allegedly transferred his share of SBPC to his attorney in this action, John Berman.

When Emmert and Jehnke learned that Taggart had transferred his interest in SPBC to Berman, they sued Taggart and Berman in Oregon state court, asserting that the transfer breached SPBC's operating agreement because Taggart did not provide the notice required to allow Emmert and Jehnke to exercise their right of first refusal to buy Taggart's interest at the agreed upon price. The state court action also sought attorneys' fees pursuant to the operating agreement. Taggart filed an answer to the state court action, sought to dismiss the action, and filed a counterclaim for attorneys' fees pursuant to the operating agreement.

On November 4, 2009, shortly before trial in the state court action, Taggart filed a voluntary Chapter 7 Bankruptcy petition (the "Petition"). The state court action was stayed pending the resolution of Taggart's bankruptcy Petition. On February 23, 2010, Taggart received his discharge in the bankruptcy proceedings.

After the discharge, Emmert and Jehnke, represented by attorney Stuart Brown, continued the state court action against Berman and Taggart. As part of the litigation, Brown served Taggart with a subpoena for a deposition. Taggart, represented by Berman, moved for a protective order that would allow him not to appear at the deposition, but the state trial court never ruled on the motion. Nonetheless, Taggart appeared for his deposition.

Prior to trial, Berman moved on Taggart's behalf to dismiss the claims against Taggart in light of the bankruptcy discharge. The state court denied the motion, finding that Taggart was a necessary party to Emmert and Jehnke's claims seeking to expel Taggart from SPBC, but the parties agreed that no monetary judgment would be awarded against Taggart. Taggart did not appear at or participate in the trial, but Berman orally renewed his motion to dismiss on Taggart's behalf at the close of evidence. The state court once again denied the motion.

After trial, the state court issued findings of fact and conclusions of law that unwound the transfer of Taggart's interest in SPBC to Berman and expelled Taggart from SPBC. Brown submitted a proposed judgment, to which Berman objected. Taggart appeared at the hearing for entry of the judgment and provided testimony and argument.

Following the hearing, the state court entered a judgment that allowed any party to petition for attorneys' fees. The litigation regarding attorneys' fees spawned a complex, interrelated web of litigation in both state and federal court.

First, Brown filed a petition for attorneys' fees in state court on behalf of SPBC, Emmert, and Jehnke. Brown's fee petition sought to recover fees against both Berman and Taggart, but limited the request for fees against Taggart to those fees that had been incurred after the date of Taggart's bankruptcy discharge. In the fee petition, Brown alerted the state court to the existence of Taggart's bankruptcy discharge and argued that Taggart could still be held liable for attorneys' fees incurred after Taggart's discharge because Taggart had "returned to

the fray." That is, SPBC, Emmert, and Jehnke claimed Taggart had willingly engaged in opposing them in the state court action after Taggart obtained his bankruptcy discharge. Taggart opposed Brown's petition for attorneys' fees, arguing his bankruptcy discharge barred any claim for attorneys' fees, whether they were incurred before or after his discharge in bankruptcy.

While the attorneys' fee petition was pending in state court, Taggart moved the bankruptcy court to reopen his bankruptcy proceeding. The day the bankruptcy court reopened Taggart's bankruptcy proceeding, Taggart filed a motion seeking to hold Brown, Jehnke, Emmert, and SPBC (collectively, the "Creditors") in contempt for violating the discharge by seeking an award of attorneys' fees against him in the state court action.

Meanwhile, the state trial court issued a ruling awarding attorneys' fees to SPBC, but not Jehnke and Emmert. The state court ruled that Taggart could be held liable for attorneys' fees that were incurred after his bankruptcy discharge because he had "returned to the fray."[1] Taggart appealed the state court's determination to the Oregon Court of Appeals. *See Sherwood Park Bus. Ctr., LLC v. Taggart*, 341 P.3d 96 (Or. Ct. App. 2014).

---

[1] Whether Taggart had "returned to the fray" was significant because if a debtor "returns to the fray" by engaging in post-bankruptcy petition litigation, a creditor may seek an attorneys' fee award if the new litigation was not within the "fair contemplation of the parties" prior to the bankruptcy petition. *See In re Castellino Villas, A. K. F. LLC*, 836 F.3d 1028, 1034–37 (9th Cir. 2016).

Subsequently, the bankruptcy court denied Taggart's motion for contempt, finding that the state court had correctly decided the issue: whether Taggart had indeed "returned to the fray." Taggart appealed the bankruptcy court's ruling to the district court. The district court reversed, finding that Taggart's actions were insufficient to constitute a "return to the fray" and, as a result, the discharge injunction barred the attorneys' fee claim. The district court remanded to the bankruptcy court for a determination of whether the Creditors "knowingly violated the discharge injunction in seeking attorney fees."[2]

On remand, the bankruptcy court found the Creditors had knowingly violated the discharge injunction by seeking attorneys' fees in the state action and entered an order holding them in contempt. Following further proceedings, the bankruptcy court awarded sanctions against SPBC, Emmert, Jehnke, and Brown's estate,[3] pursuant to the court's contempt ruling.

The Creditors appealed the bankruptcy court's contempt ruling to the Bankruptcy Appellate Panel ("BAP"). On appeal, the BAP reversed the bankruptcy court's finding of contempt. The BAP reasoned that the Creditors could not be held in contempt unless they "knowingly" violated the discharge injunction. Because the BAP found that the Creditors had a good faith belief that the discharge injunction did not apply to their attorneys' fee

---

[2] Emmert, Brown, Jehnke, and SPBC filed a notice of appeal of the district court's decision. This court dismissed the appeal because the district court's ruling was not a final order.

[3] Brown passed away in 2013. Shelley Lorenzen represents Brown in this litigation as the executor of his estate.

claim, it concluded that they had not "knowingly" violated the discharge injunction.

In the meantime, the Oregon Court of Appeals reversed the state trial court's ruling regarding attorneys' fees. *See Taggart*, 341 P.3d at 102–04. In line with the district court, the Oregon Court of Appeals held that Taggart's actions were not sufficiently affirmative or voluntary to constitute a "return to the fray." *Id.* As a result, the court concluded that the discharge injunction barred the recovery of attorneys' fees. *Id.*

Ultimately, the Creditors were barred from pursuing attorneys' fees against Taggart by the rulings of both the district court and the Oregon Court of Appeals. Additionally, due to the BAP's ruling, the Creditors were not liable for sanctions for knowingly violating the discharge injunction by seeking attorneys' fees against Taggart in the state court litigation.

Taggart filed a notice of appeal challenging the BAP's decision to reverse the bankruptcy court's contempt findings against the Creditors. The Creditors filed a notice of cross-appeal challenging the district court's ruling that Taggart had not returned to the fray in the state court litigation.

I

We begin with Taggart's appeal, in which he argues that the BAP committed reversible error when it held that the Creditors could not be held in contempt because they did not *knowingly* violate the discharge injunction. A discharge under Chapter 7 of the bankruptcy code "discharges the debtor from all debts that arose before the date of the" bankruptcy petition. 11 U.S.C. § 727(b). Once

issued, the discharge "operates as an injunction against the commencement or continuation of an action . . . to collect, recover or offset any such debt as a personal liability of the debtor." 11 U.S.C. § 524(a)(2). A bankruptcy court may enforce the discharge injunction by holding a party in contempt for knowingly violating the discharge. *In re Zilog, Inc.*, 450 F.3d 996, 1007 (9th Cir. 2006).

In this case, after the district court concluded that Taggart had not "returned to the fray," it remanded the case to the bankruptcy court for a determination of whether the Creditors should be held in contempt. The bankruptcy court determined that the Creditors were aware of the discharge order, but proceeded with their efforts to recover attorneys' fees from Taggart. The bankruptcy court concluded that it was irrelevant whether the Creditors held a subjective good faith belief that the discharge injunction did not apply to their claim. As a result, the bankruptcy court held that the Creditors had committed a knowing violation of the discharge injunction and it held them in contempt.

On appeal, the BAP reversed. The BAP concluded that the Creditors had a subjective good faith belief that their claim was exempt from the discharge injunction. In light of this good faith belief, the BAP held that the Creditors did not "knowingly" violate the discharge injunction, even though an actual violation had occurred.

We review the BAP's decisions de novo. *In re Filtercorp, Inc.*, 163 F.3d 570, 576 (9th Cir. 1998). The bankruptcy court's decision to impose contempt sanctions is reviewed for an abuse of discretion. *In re Dyer*, 322 F.3d 1178, 1191 (9th Cir. 2003). A bankruptcy court abuses its discretion if its decision is based on an incorrect legal

rule, or if its "application of the correct legal standard was (1) 'illogical,' (2) 'implausible,' or (3) without 'support in inferences that may be drawn from the facts in the record.'" *United States v. Hinkson*, 585 F.3d 1247, 1262 (9th Cir. 2009) (quoting *Anderson v. City of Bessemer*, 470 U.S. 564, 577 (1985)).

"The standard for finding a party in civil contempt is well settled: The moving party has the burden of showing by clear and convincing evidence that the contemnors violated a specific and definite order of the court. The burden then shifts to the contemnors to demonstrate why they were unable to comply." *In re Bennett*, 298 F.3d 1059, 1069 (9th Cir. 2002) (quoting *F.T.C. v. Affordable Media*, 179 F.3d 1228, 1239 (9th Cir. 1999)). As noted above, a bankruptcy court may hold a party in contempt for knowingly violating the discharge injunction. *Zilog*, 450 F.3d at 1007. We have adopted a two-part test for determining the propriety of a contempt sanction in the context of a discharge injunction: "[T]o justify sanctions, the movant must prove that the creditor (1) knew the discharge injunction was applicable and (2) intended the actions which violated the injunction." *Bennett*, 298 F.3d at 1069.

Only the first prong of the test is at issue here. To satisfy the first prong, knowledge of the applicability of the injunction must be proved as a matter of fact and may not be inferred simply because the creditor knew of the bankruptcy proceeding. *Zilog*, 450 F.3d at 1007–08; *see also Dyer*, 322 F.3d at 1191–92 (rejecting an attempt to infer knowledge of the automatic stay based on knowledge of the bankruptcy proceedings in the context of a contempt

ruling).[4] Additionally, the creditor's good faith belief that the discharge injunction does not apply to the creditor's claim precludes a finding of contempt, even if the creditor's belief is unreasonable. *Zilog*, 450 F.3d at 1009 n.14 ("To the extent that the deficient notices [from the bankruptcy court and opposing counsel] led the [creditors] to believe, even unreasonably, that the discharge injunction did not apply to their claims because they were not affected by the bankruptcy, this would preclude a finding of willfulness.").

In this case, the bankruptcy court abused its discretion by concluding that the Creditors knowingly violated the discharge injunction. Specifically, the bankruptcy court abused its discretion by applying an incorrect rule of law. *See Hinkson*, 585 F.3d at 1262. The bankruptcy court held that a good faith belief that the discharge injunction was inapplicable to the Creditors' claims was irrelevant for purposes of determining whether there was a "knowing" violation of the discharge injunction. This holding conflicts with *Zilog*, where we stated that even an unreasonable belief that the discharge injunction did not apply to a creditor's claims would preclude a finding of contempt. 450 F.3d at 1009 n.14.

---

[4] Although *Dyer* dealt with a violation of the automatic stay, rather than a violation of the discharge injunction, the sanctions at issue were not imposed under the bankruptcy code provision that specifically allows sanctions for a violation of the automatic stay, 11 U.S.C. § 362(h). *Dyer*, 322 F.3d at 1189. Rather, sanctions were imposed under the bankruptcy court's 11 U.S.C. § 105(a) contempt authority, thereby invoking the standard that applies when there is a violation of the discharge injunction. *Id.*

It is true, as Taggart points out, that language from our prior opinions in *Bennett* and *Dyer* appears to be somewhat in tension with *Zilog*.[5] However, neither *Bennett* nor *Dyer* held that a creditor's subjective good faith belief that the discharge injunction is inapplicable is irrelevant to the contempt analysis. In fact, *Bennett* expressly states that the creditor must know that the discharge injunction is "applicable" to the creditor's claims, and *Dyer* cited that holding with approval. *Bennett*, 298 F.3d at 1069; *Dyer*, 322 F.3d at 1192. Regardless, *Zilog*'s statement of the law is clear, directly addresses the question at issue in here, and is binding on this court.

In this case, as the BAP found, the Creditors possessed a good faith belief that the discharge injunction did not apply to their claims based on their contention that Taggart had "returned to the fray," and Taggart does not contend otherwise. Much like the creditors in *Zilog* relied on statements by the debtor's counsel and the bankruptcy court in concluding that their claims were not impacted by the discharge injunction, the Creditors relied on the state court's judgment that the discharge injunction did not apply to their claim for post-petition attorneys' fees. Although the Creditors—like the creditors in *Zilog*—were ultimately incorrect, their good faith belief, even if unreasonable, insulated them from a finding of contempt. *Zilog*, 450 F.3d at 1009 n.14. As a result, the BAP did not

---

[5] Taggart specifically highlights language from *Dyer*, which states: "In determining whether the contemnor violated the stay, the focus 'is not on the subjective beliefs or intent of the contemnors in complying with the order, but whether in fact their conduct complied with the order at issue.'" 322 F.3d at 1191 (quoting *In re Hardy*, 97 F.3d 1384, 1390 (11th Cir. 1996)).

err when it reversed the contempt sanctions entered by the bankruptcy court against the Creditors.

II

Because we have determined that the Creditors cannot be held in contempt for any alleged violation of the discharge injunction, we need not reach the arguments raised in the Creditors' cross-appeal regarding the district court's holding that the Creditors violated the discharge injunction by seeking an attorneys' fee award in the state court litigation.[6] Even if the Creditors did violate the discharge injunction—and we express no opinion as to whether they did or did not—they cannot be held in contempt for that alleged violation. As discussed above, they acted pursuant to their good faith belief that, due to Taggart's "return to the fray," the discharge injunction did not apply to their claims. As a result, we decline to reach the issues raised by the Creditors' Cross-Appeal.

---

[6] After the district court's decision in this case, but before the parties completed their briefing in our court, another Ninth Circuit panel issued an opinion in *In re Castellino Villas, A. K. F. LLC*, 836 F.3d 1028, 1034 (9th Cir. 2016). Lorenzen's briefing to this court recognized the *Castellino Villas* opinion and noted that, in Lorenzen's view, *Castellino Villas* commands resolution of whether Creditors violated the discharge against the Creditors. At the time of briefing in this case, *Castellino Villas* had been decided, but could have been reheard by an en banc panel of this court or overturned or modified by the Supreme Court. Lorenzen requested that we deem her cross-appeal withdrawn if *Castellino Villas* was not overturned or modified. Because *Castellino Villas* has neither been overturned nor modified, we grant Lorenzen's request to withdraw her cross-appeal. Therefore, we do not address it.

III

In light of the above, we **AFFIRM** the BAP's opinion reversing the bankruptcy court's order entering contempt sanctions against the Creditors.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 16-35402

In re BRADLEY WESTON TAGGART,
Debtor,

SHELLEY A. LORENZEN, Executor of Estate of
Stuart Brown; et al.,
Appellants,

v.

BRADLEY WESTON TAGGART,
Appellee.

No. 16-60032

In re BRADLEY WESTON TAGGART,
Debtor,

BRADLEY WESTON TAGGART,
Appellant,

v.

SHELLEY A. LORENZEN, Executor of Estate of Stuart Brown; TERRY W. EMMERT; KEITH JEHNKE; SHERWOOD PARK BUSINESS CENTER, LLC,
Appellees.

No. 16-60033

In re BRADLEY WESTON TAGGART,
Debtor,

BRADLEY WESTON TAGGART,
Appellant,

v.

TERRY W. EMMERT; KEITH JEHNKE; SHERWOOD PARK BUSINESS CENTER, LLC; SHELLEY A. LORENZEN, Executor of Estate of Stuart Brown
Appellees.

No. 16-60039

In re BRADLEY WESTON TAGGART,
Debtor,

SHELLEY A. LORENZEN, Executor of Estate of Stuart Brown,
Appellant,

v.

BRADLEY WESTON TAGGART,
Appellee.

No. 16-60040

In re BRADLEY WESTON TAGGART,
Debtor,

TERRY W. EMMERT; KEITH JEHNKE;
SHERWOOD PARK BUSINESS CENTER, LLC,
Appellants,

v.

BRADLEY WESTON TAGGART,
Appellee.

No. 16-60042

In re BRADLEY WESTON TAGGART,
Debtor,

SHELLEY A. LORENZEN, Executor of Estate of
Stuart Brown,
Appellant,

v.

BRADLEY WESTON TAGGART,
Appellee.

No. 16-60043

In re BRADLEY WESTON TAGGART,
Debtor,

TERRY W. EMMERT; KEITH JEHNKE;
SHERWOOD PARK BUSINESS CENTER, LLC,
Appellants,

v.

BRADLEY WESTON TAGGART,
Appellee.

Filed: September 7, 2018

Before LEAVY, PAEZ, and BEA, Circuit Judges.

ORDER

The panel has voted to grant each amicus curiae motion. The motions for leave to file amici curiae briefs are **GRANTED**.

The panel has voted to deny Appellee's petition for panel rehearing. The panel has also voted to deny Appellee's petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on en banc rehear-

ing. *See* Fed. R. App. P. 35(f). The petition for panel rehearing and the petition for rehearing en banc are **DENIED**.

APPENDIX C

UNITED STATES BANKRUPTCY APPELLATE PANEL OF THE NINTH CIRCUIT

BAP No. OR-15-1119-JuKiF
BAP No. OR-15-1158-JuKiF

In re: BRADLEY WESTON TAGGART,
Debtor.

TERRY W. EMMERT; KEITH JEHNKE; SHERWOOD PARK BUSINESS CENTER, LLC; SHELLEY A. LORENZEN, Executor of the Estate of Stuart Brown,
Appellants,

v.

BRADLEY WESTON TAGGART,
Appellee.

Filed: April 12, 2016

Before JURY, KIRSCHER, and FARIS, Bankruptcy Judges.

OPINION

JURY, Bankruptcy Judge:

Sherwood Park Business Center, LLC (SPBC) commenced a state court lawsuit against chapter 7[1] debtor, Bradley Weston Taggart (Debtor), BT of Sherwood, LLC (BT), and Debtor's attorney John M. Berman (Mr. Berman), prior to Debtor's bankruptcy filing. Terry W. Emmert (Mr. Emmert), Keith Jehnke (Mr. Jehnke), and Debtor were members of SPBC. The litigation arose due to Debtor's transfer of his membership interest in SPBC to another LLC entity. The membership was ultimately purchased by Mr. Berman, in violation of SPBC's operating agreement. Among other things, SPBC sought to unwind Debtor's transfer of his membership interest and expel him from the company. Debtor and BT answered the complaint and asserted a counterclaim against Mr. Emmert, Mr. Jehnke, and SPBC for attorneys' fees.

Debtor filed his bankruptcy petition on the eve of the state court trial and subsequently received his discharge. Mr. Emmert and Mr. Jehnke, represented by Stuart M. Brown (Mr. Brown),[2] resumed the state court litigation postpetition. They sought no money judgment against Debtor due to his discharge. The action ultimately went to trial. Debtor did not appear, although Mr. Berman did. After trial, the state court ruled in favor of SPBC by unwinding Debtor's transfer of his membership interest and reinstating Mr. Emmert's and Mr. Jehnke's right of first

---

[1] Unless otherwise indicated, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101–1532, and "Rule" references are to the Federal Rules of Bankruptcy Procedure.

[2] Shelley A. Lorenzen (Ms. Lorenzen) is the executor of Mr. Brown's estate.

refusal to purchase the interest under the SPBC operating agreement.

Mr. Brown later filed a petition (Petition) in the state court on behalf of Mr. Emmert, Mr. Jehnke, and SPBC, seeking attorneys' fees and costs for the period after Debtor's discharge. At the same time, he sought a ruling from the state court on the issue whether the discharge injunction applied to the post-discharge fee request, asserting that Debtor had "returned to the fray" under the holding in *Boeing North American, Inc. v. Ybarra (In re Ybarra)*, 424 F.3d 1018 (9th Cir. 2005). Debtor opposed, arguing that he had not voluntarily returned to the fray under the *Ybarra* rule. After a hearing, at which Debtor testified, the state court issued a written ruling, finding that Debtor had returned to the fray and thus the discharge injunction did not apply to the post-discharge request for attorneys' fees and costs under the *Ybarra* rule. The state court awarded SBPC its attorneys' fees and costs, but denied fees and costs as to Mr. Emmert and Mr. Jehnke.

Prior to the state court's ruling, Debtor reopened his bankruptcy case and filed a motion seeking to hold Mr. Emmert, Mr. Jehnke, and Mr. Brown (collectively, Appellants) in contempt for violating the discharge injunction under § 524(a)(2). The bankruptcy court ruled on the matter after the state court had ruled. The bankruptcy court denied Debtor's motion, finding no error with the state court's ruling on the applicability of the discharge injunction under *Ybarra*. Upon its own de novo review, the bankruptcy court also found that the record supported the finding that Debtor had voluntarily returned

to the fray in the state court litigation and thus the discharge injunction did not apply to Appellants' request for post-discharge attorneys' fees. At Mr. Brown's request, the state court entered judgment in favor of SPBC pursuant to its previous award.

Debtor appealed the bankruptcy court's decision to the district court. The district court reversed, finding that Debtor's actions in the state court litigation were not sufficiently affirmative and voluntary to be considered returning to the fray under the *Ybarra* rule. The district court remanded the matter to the bankruptcy court to determine whether Appellants knowingly violated the discharge injunction by seeking attorneys' fees in the state court.

On remand, the bankruptcy court found that Debtor had proved by clear and convincing evidence that Appellants willfully violated the discharge injunction since they were aware of the discharge injunction and intended the actions which violated it. The court entered an order for contempt. After a subsequent hearing, the bankruptcy court entered a judgment awarding sanctions in favor of Debtor against Mr. Emmert, Mr. Jehnke, SPBC, and Mr. Brown.

Mr. Emmert, Mr. Jehnke, and SPBC filed a timely appeal from the judgment (BAP No. OR–15–1119). Ms. Lorenzen, as executor for Mr. Brown's estate, filed a separate notice of appeal from the same judgment (BAP No. OR–15–1158). As further discussed below, we conclude that the bankruptcy court erred by applying an incorrect legal standard to determine whether Appellants had actual knowledge that the discharge injunction applied to their fee request in the state court as required under the

holding in *Zilog, Inc. v. Corning (In re Zilog, Inc.)*, 450 F.3d 996 (9th Cir. 2006). Accordingly, we REVERSE the bankruptcy court's finding of contempt and VACATE the judgment awarding sanctions.

I. FACTS[3]

A. Prepetition Events And Debtor's Bankruptcy Filing

Debtor was a general contractor who operated through a corporation, Builders, Inc. (Builders). He developed several business parks, anchored by tenants who also were owners. In October 1999, SPBC was formed to build and operate a two-building business park in Sherwood, Oregon. SPBC was initially owned by four members, each with a 25% member interest: Debtor, Mr. Jehnke, John Hoffard, and Anthony Benthin. Debtor was designated as the manager. At some point, Mr. Emmert succeeded to the member interest of Mr. Benthin in SPBC.[4] The operating agreement governed the operations of SPBC, including transfers of ownership. Under the agreement, members had the right of first refusal before any transfer was made and any transfer of a membership interest had to be approved by a majority of the other members.

In late 2004, Debtor began experiencing financial difficulty. In connection with Builders, he stopped paying

---

[3] Many of the background facts are set forth in the bankruptcy court's Memorandum Decisions dated December 9, 2011, and December 16, 2014.

[4] Mr. Hoffard apparently joined with Debtor in filing the counterclaim against Mr. Emmert, Mr. Jehnke, and SPBC.

the payroll withholding to the Oregon Department of Revenue (ODR) and the Internal Revenue Service (IRS) and began diverting funds intended for the business to his own use. Tax liens of about $250,000 were placed against him as a result of unpaid withholdings for Builders.

At some point in 2004, Mr. Emmert acquired a 50% ownership interest in Builders. Thereafter, relations between Debtor and Mr. Emmert became contentious.

In 2005, Debtor encouraged three creditors to file an involuntary bankruptcy petition against Builders, which had become insolvent while the SPBC buildings were being constructed. The IRS claim in the Builders' bankruptcy case for unpaid withholding was (with interest) about $400,000, and the ODR had filed liens for about $110,000. These liens were filed in Washington and Deschutes Counties and attached to all real and personal property that was either owned by Debtor in late 2005 or acquired after the date.

Mr. Jehnke replaced Debtor as the SPBC manager in 2005.

It was also discovered sometime in late 2004 or early 2005 that Debtor had diverted about $30,000 in cash from SPBC for his own purposes. These funds were designated for a deposit for steel building materials. Because Debtor refused to return the money or otherwise apply it to the building materials, SPBC initiated an arbitration. The arbitrator found that Debtor converted the funds and breached his fiduciary duty to SPBC. In 2008, the award was confirmed in a judgment in favor of SPBC and against Debtor. Mr. Berman represented Debtor in the arbitration and paid the award on Debtor's behalf.

Debtor's financial condition subsequently deteriorated further. In mid-2007, Debtor, with the assistance of Mr. Berman, formed BT and transferred his 25% member interest in SPBC to BT. Debtor pursued this so that he could sell his interest in the new LLC without complying with the restrictions imposed by SPBC's operating agreement for the sale of his membership interest. Unable to sell his interest in BT to a third party, Debtor transferred his entire membership interest in BT to Mr. Berman in exchange for payments totaling $200,000. Mr. Berman became a member in SPBC.

In September 2008, SPBC filed a complaint against Debtor, BT, and Mr. Berman in the state court, asserting claims for breach of fiduciary duty, expulsion due to breach of contract, attorneys' fees, and declaratory relief (State Court Lawsuit). An amended complaint asserted essentially the same claims with elaborating allegations. SPBC sought to expel Debtor from the company and to unwind the transfers between Debtor and BT so that Mr. Emmert and/or Mr. Jehnke could purchase Debtor's membership interest. In October 2009, Debtor filed an answer to the amended complaint, asserting affirmative defenses and stating a counterclaim for attorneys' fees against Mr. Emmert, Mr. Jehnke, and SPBC.

On November 4, 2009, the day that the trial in the State Court Lawsuit was to begin, Debtor filed a chapter 7 petition. In Schedule B, Debtor did not mention any interest in either SPBC or BT, but he did include a potential attorneys' fee award on his counterclaim in the State Court Lawsuit. Shortly after the filing, the chapter 7 trustee in Debtor's case filed a report of no assets available

for distribution, and Debtor received his discharge by order entered on February 23, 2010. The State Court Lawsuit was stayed while Debtor's case was pending.

B. Post-discharge Events

1. The State Court Proceedings

After Debtor received his discharge, Mr. Brown resumed the State Court Lawsuit on behalf of Mr. Jehnke and Mr. Emmert. He served Debtor with a subpoena for a deposition on April 9, 2010. Mr. Berman filed a motion for a protective order on Debtor's behalf, requesting that the subpoena be quashed. Evidently the state court denied the motion because Debtor appeared for his deposition and was examined.

The state court scheduled the trial for May 18, 2010. The day before, Mr. Berman filed a motion to dismiss the claims against Debtor. Mr. Berman asserted that dismissal was proper since the claims against Debtor related solely to his pre-bankruptcy conduct and thus were subject to his discharge. The motion did not mention Debtor's counterclaim against Mr. Emmert, Mr. Jehnke, and SPBC for attorneys' fees.

The motion to dismiss was argued on the first day of the trial. Mr. Brown agreed that his clients would not be seeking monetary relief against Debtor, but argued that Debtor was a necessary party with respect to the expulsion claim. The state court ruled that no money judgment would be entered against Debtor, but otherwise denied the motion to dismiss. Mr. Berman renewed the motion to dismiss the claims against Debtor at the end of trial. The state court denied the motion. Debtor did not appear or testify at the trial.

Following the trial, the state court generally found in favor of SPBC. Mr. Brown drafted the Findings of Fact and Conclusions of Law (Findings and Conclusions) which the state court later signed. All counterclaims of Debtor and BT were dismissed with prejudice. Debtor's transfer of his interest in SPBC was unwound and the right of first refusal to purchase the interest according to the provisions in the operating agreement was triggered. The judgment provided that the purchase price shall be the fair market value of SPBC as of the date of entry of judgment, multiplied by Debtor's 25% interest less any unpaid post-bankruptcy petition attorneys' fees and costs, and any prevailing party fees which might be assessed against Debtor under Oregon law. The Findings and Conclusions were entered on July 29, 2010.

Although the issue of attorneys' fees was discussed, that issue was not decided at the judgment stage. The state court entered a general judgment on May 26, 2011. Debtor and BT appealed the judgment.

Subsequently, Mr. Brown filed the Petition seeking attorneys' fees and costs on behalf of Mr. Emmert, Mr. Jehnke, and SPBC.[5] The Petition acknowledged that Debtor's liability for fees, if any, "would be limited to fees incurred after he filed for bankruptcy on November 4, 2009[,]" citing *In re Ybarra*.

In opposition, Debtor argued:

> Not only have I not sought to be involved with this litigation at any time, especially after my bankruptcy,

---

[5] The attorney who represented SPBC authorized Mr. Brown to file the Petition on behalf of SPBC.

> but I sought to be dismissed prior to the recent trial. I note that Emmert and Jehnke contend that I 'joined the fray' by seeking a protective order. . . . Any legal fees incurred by Emmert and Jehnke in this matter were mostly not in litigation with me because I did not have much to do with this case. . . . It is submitted that when I received a discharge in bankruptcy, that discharge protected me from any liability such as being sought in this matter, both for attorney fees and for any costs. It is important to point out that I sought nothing in this litigation.

Mr. Brown clarified at the August 1, 2011 hearing on the Petition that only post-discharge attorneys' fees and costs were sought from Debtor. In arguing that Debtor returned to the fray under the *Ybarra* rule, Mr. Brown noted that on the one hand, Mr. Berman will say he does not represent Debtor and will not accept service, but on the other hand, Mr. Berman will come into court and file something on behalf of Debtor. Next, he pointed out that Debtor had moved for a protective order post-discharge, filed a motion to dismiss the claims against him, and never dismissed his counterclaim for an award of attorneys' fees and costs. Mr. Brown further asserted that Debtor claimed the attorneys' fees that might be awarded to him in the litigation as an asset in his bankruptcy case. This evidence, according to Mr. Brown, showed that Debtor had not abandoned his counterclaim for attorneys' fees against Mr. Emmert, Mr. Jehnke, and SPBC. Finally, Mr. Brown argued that although Debtor claimed to have asked to be dismissed from the litigation, this was not true. Rather, Debtor asked for dismissal of the claims against him on the grounds that those monetary claims

were discharged by his bankruptcy. Mr. Brown maintained that all these facts showed that Debtor was participating in the litigation going forward.

Mr. Berman called and examined Debtor as a witness at the hearing on the Petition. Debtor testified that he was tired of the litigation that had been going on for years and that he never intended to participate in any manner in the lawsuit after his bankruptcy discharge. He also testified that after he filed his bankruptcy petition, he did nothing to attempt to assert his right under the state court counterclaim for attorneys' fees. At another point, Mr. Berman stated on the record that he was representing Debtor. Finally, in argument, Mr. Berman again noted that Debtor had no involvement in the case. At that point, Mr. Berman informed the state court that Debtor had filed a motion for contempt in the bankruptcy court alleging that Appellant had violated the discharge injunction. Mr. Berman opined that the state court could decide the matter or wait and hear what the bankruptcy court said. After the hearing concluded, the state court took the matter under advisement.

On August 11, 2011, the state court issued a letter opinion (Letter Opinion) addressing the Petition. The Letter Opinion states in relevant part:

> The court notes that *In re Ybarra*, 424 F[.]3d 1018 (9th Cir. 2005) holds that the trial court has power to award post-petition attorney fees against a debtor who continues to pursue litigation post-petition that had been begun pre-petition. This is consistent with the federal case law the court reviewed.

> Taggart filed an answer that was file stamped October 28, 2009. The answer contained a counterclaim for attorney fees based on Section 13.6 of the Operating Agreement.
>
> The answer also sought to have plaintiff's claim to be dismissed against him. This was consistent with the oral Motion to Dismiss raised at the time of trial. Taggart never abandoned his counterclaim for attorney fees. Rather he continued to pursue his position post-petition that the plaintiff's claim against him be dismissed which, if successful, would have led to Taggart having a contractual right to obtain attorney fees.
>
> The court awards attorney fees in favor of BT of Sherwood [sic-actually, SPBC] in the amount sought at oral argument. My notes are difficult to decipher but I believe that amount was $44,691.50. (It may be accurately $44,611.50 as the ten column is the one I am having trouble reading.) Costs and disbursements sought as well as the standard prevailing party fee are also appropriate.
>
> [SPBC] is the prevailing party with respect to Brad Taggart (as noted above) . . . .

In the end, the state court granted SPBC its attorneys' fees and costs, but denied Mr. Emmert's and Mr. Jehnke's requests.

2. The Bankruptcy Court Proceedings

Meanwhile, about one month earlier, on July 13, 2011, Debtor had reopened his case and filed a motion in the bankruptcy court seeking to hold Mr. Brown, Mr. Emmert, and Mr. Jehnke in contempt for seeking attorneys'

fees and costs in the state court in violation of the discharge injunction under § 524. Debtor repeated his arguments that he made no claim to any interest in SPBC and that he filed bankruptcy because he did not want any further involvement with SPBC, Mr. Emmert, or Mr. Jehnke. He further reiterated that he did not participate in the state court trial and made no claims in the trial. Finally, he contended that the request for attorneys' fees in the state court was causing him extreme emotional distress and that Mr. Brown, Mr. Emmert, and Mr. Jehnke were denying him a fresh start. Debtor sought sanctions consisting of his attorneys' fees and costs, $50,000 for emotional distress, and $100,000 in punitive damages for Appellants' intentional violation of the discharge injunction.

The bankruptcy court held an evidentiary hearing on November 14, 2011. The court acknowledged that the state court had concurrent jurisdiction to decide whether the discharge injunction was violated, but its decision had no effect if the state court "got it wrong." The bankruptcy court also observed that it had to determine whether Debtor's involvement in the state court litigation, either directly or through Mr. Berman, fit within the *Ybarra* rule. The bankruptcy court took the matter under advisement.

On December 9, 2011, the court issued its decision. Finding that the state court applied the correct legal standard under *Ybarra*, the bankruptcy court concluded that the state court's factual findings regarding Debtor's return to the fray were not clearly erroneous. After conducting an independent review of the state court proceedings, the bankruptcy court observed that due to the

"mixed record," it was not sure whether any of Debtor's actions, on his own or through Mr. Berman, would establish that Debtor renewed active participation in the State Court Lawsuit post-discharge. Apparently, the pivotal fact for the bankruptcy court's analysis was the state court's determination that Debtor's attempted transfer of his membership interest in SPBC was ineffective and thus would be unwound, and that Debtor would be paid for that interest.[6] Accordingly, the bankruptcy court found that Debtor re-engaged in the State Court Lawsuit, effectively returning to the fray for *Ybarra* purposes. The court concluded that Debtor did not meet his burden of proof by clear and convincing evidence showing that Appellants had willfully violated the discharge injunction.

On January 18, 2012, Mr. Brown submitted a supplemental judgment (Supplemental Judgment) to the state court in connection with its previous award of attorneys' fees and costs to SPBC.

On January 23, 2012, the bankruptcy court entered the order denying Debtor's motion for contempt. Debtor moved for reconsideration, which the bankruptcy court denied.

---

[6] In other words, although Debtor claimed he asserted no interest in SPBC in the litigation, because the state court unwound the transfer of his membership interest, he was once again a member of SPBC. The return to the status quo gave Mr. Emmert and/or Mr. Jehnke the right of first refusal to purchase his interest as per the operating agreement. Therefore, Debtor would receive payment for his interest from one of them, separate and apart from the monies paid to him by Mr. Berman.

3. The District Court Proceedings

Debtor appealed the bankruptcy court's order denying his motion for contempt to the district court. The district court reversed, based on its conclusion that Debtor's actions in the state court were not sufficiently affirmative and voluntary to be considered returning to the fray under *Ybarra*. The district court remanded the matter to the bankruptcy court to consider whether Debtor had proven that Appellants "knowingly" violated the discharge injunction in seeking the attorneys' fees and costs in the state court.[7]

4. The Remand Proceedings

On November 7, 2014, the bankruptcy court heard further oral argument on the issue whether Appellants "willfully" violated the discharge injunction and took the matter under advisement.

On December 16, 2014, the bankruptcy court issued its decision. The court recited the two-part test in the Ninth Circuit for determining whether there was a willful violation of the discharge injunction set forth in *Zilog*. In *Zilog*, the Ninth Circuit cited with approval the standard adopted by the Eleventh Circuit for violation of the discharge injunction: "[T]he movant must prove that the creditor (1) knew the discharge injunction was applicable

---

[7] Mr. Emmert, Mr. Jehnke, and SPBC recognized in their reply brief that we have no jurisdiction to review the district court's order. Ms. Lorenzen recognized this as well in her opening brief. We express no opinion on the question whether Debtor "returned to the fray," because that issue is before the Ninth Circuit, not us.

and (2) intended the actions which violated the injunction." 450 F.3d at 1007 (citing *Renwick v. Bennett (In re Bennett)*, 298 F.3d 1059, 1069 (9th Cir. 2002) (citing *Hardy v. United States (In re Hardy)*, 97 F.3d 1384, 1390 (11th Cir. 1996)).

Although the bankruptcy court cited the correct test for a finding of willfulness from *Zilog*, it instead used the test from *Hardy* in connection with the first prong of the test—the actual knowledge requirement. There, the knowledge requirement is phrased as whether the defendant in the contempt action "knew that the [discharge injunction] was invoked." *In re Hardy*, 97 F.3d at 1390. Further relying on *Hardy*, the bankruptcy court found that this test did not allow the court to consider Appellants' subjective beliefs, good faith or otherwise, regarding whether, as a legal matter, the discharge applied to the proceedings. As a result, the court concluded that the test for actual knowledge was akin to a strict liability test. The court further decided that neither the state court's prior decision or its decision on the applicability of *Ybarra* insulated Appellants from a "willfulness" finding. Apparently, the bankruptcy court reached that conclusion on the basis that the state court's decision was wrong and its decision was reversed.

Based on this reasoning, the bankruptcy court decided that Debtor had proved the actual knowledge requirement by clear and convincing evidence. In other words, Appellants had actual knowledge of the discharge injunction at the time they filed the Petition in the state

court requesting attorneys' fees and costs. The court concluded: "As such they are charged with knowledge of the discharge injunction."[8]

In considering whether Appellants intended the actions which violated the discharge injunction, the bankruptcy court found that there was no dispute. Mr. Brown testified he prepared and submitted the Supplemental Judgment. Because Mr. Brown would not have proceeded without approval from his clients, and because the record did not reflect that Mr. Emmert and Mr. Jehnke had instructed Mr. Brown not to proceed with the Petition, the court found that they also intended the actions that led to the entry of the Supplemental Judgment. The court thus found Debtor had proved the second element of the willfulness test by clear and convincing evidence. The bankruptcy court found the Supplemental Judgment void and entered an order holding Appellants in contempt for violating the discharge injunction.

Subsequently, the bankruptcy court held an evidentiary hearing regarding Debtor's damages and issued a written decision on March 17, 2015. While Debtor requested emotional distress damages of $50,000, the bankruptcy court ultimately found that he was entitled to $5,000, awarded jointly and severally against Appellants. With respect to the attorneys' fees and costs, the bankruptcy court awarded fees in the amount of $101,450 and costs of $4,143.71 for a total of $105,593.71, jointly and

---

[8] We assume the bankruptcy court made this finding because Mr. Emmert and Mr. Jehnke had requested their attorneys' fees and costs and not because they sought entry of the Supplemental Judgment which only applied to SPBC.

severally against Mr. Emmert, Mr. Jehnke, and SPBC, and attorneys' fees and costs totaling $92,118.71 against Mr. Brown's estate, payable jointly and severally as part of the total attorneys' fees and costs award against Appellants.

Finally, Debtor requested $100,000 in punitive damages, which he later reduced to $20,000. As to Mr. Brown, the court found punitive damages were not appropriate since they would serve no deterrent purposes with respect to his estate. The court awarded $2,000 in punitive damages jointly and severally against Mr. Emmert, Mr. Jehnke, and SPBC.

The bankruptcy court entered the order on March 26, 2015. Four days later, the court entered the judgment regarding the sanctions.

On April 13, 2015, Mr. Emmert, Mr. Jehnke, and SPBC filed a timely notice of appeal from the judgment. On the same day, Ms. Lorenzen filed a motion to extend the time for appeal. After a hearing, the bankruptcy court granted the motion on April 27, 2015, extending the time to file a notice of appeal for fourteen days after the entry of the order. On May 11, 2015, Ms. Lorenzen filed a timely notice of appeal from the judgment.[9]

---

[9] The Panel issued a one-judge order requiring Ms. Lorenzen to file a response as to why BAP No. OR–15–1158 should not be dismissed as untimely as it appeared the notice of appeal was filed one day late. The confusion arose due to the entry of a wrong event code on May 11, 2015, which was later corrected on the following day. The Panel deemed her appeal timely and a briefing schedule was set.

II. JURISDICTION

The bankruptcy court had jurisdiction pursuant to 28 U.S.C. §§ 1334 and 157(b)(2)(O). We have jurisdiction under 28 U.S.C. § 158.

III. ISSUE

Did the bankruptcy court abuse its discretion by finding that Appellants willfully violated the discharge injunction?

IV. STANDARDS OF REVIEW

Determining whether the bankruptcy court applied the correct legal standard is a question of law that the panel reviews de novo. *See Bell Flavors & Fragrances, Inc. v. Andrew (In re Loretto Winery, Ltd.)*, 107 B.R. 707, 709 (9th Cir. BAP 1989).

The bankruptcy court's finding of a willful violation of § 524 is reviewed for clear error. *Sciarrino v. Mendoza*, 201 B.R. 541, 543 (E.D.Cal.1996) (citing *McHenry v. Key Bank (In re McHenry)*, 179 B.R. 165, 167 (9th Cir. BAP 1995)) (reviewing a willful violation of the automatic stay). A finding is clearly erroneous when it is illogical, implausible, or without support in the record. *United States v. Hinkson*, 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc).

We review the decision to impose sanctions for contempt for an abuse of discretion. *Knupfer v. Lindblade (In re Dyer)*, 322 F.3d 1178, 1191 (9th Cir. 2003); *Nash v. Clark Cty. Dist. Atty's Office (In re Nash)*, 464 B.R. 874, 878 (9th Cir. BAP 2012). We review for clear error the trial court's factual findings in support of a punitive damages award. *Bergen v. F/V St. Patrick*, 816 F.2d 1345, 1347 (9th Cir. 1987).

A bankruptcy court abuses its discretion if its decision is based on an incorrect legal rule, or if its findings of fact were illogical, implausible, or without support in the record. *Hinkson*, 585 F.3d at 1262.

V. DISCUSSION

In a chapter 7 case, with exceptions not relevant here, "[t]he [bankruptcy] court shall grant the debtor a discharge." § 727(a). When entered, that order "discharges the debtor from all debts that arose before the date of the [bankruptcy filing]." § 727(b). Section 524(a) prescribes the legal effect of a discharge:

> (a) A discharge in a case under this title—. . . (2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived[.]

"The purpose of the discharge injunction is to protect the debtor from having to put on a defense in an improvident state court action or otherwise suffer the costs, expense and burden of collection activity on discharged debts." *In re Eastlick*, 349 B.R. 216, 229 (Bankr.D.Idaho 2004) (citing *Levy v. Bank of the Orient (In re Levy)*, 87 B.R. 107, 108 (Bankr.N.D.Cal.1988).

A. Contempt Standards: Willful Violation of Discharge Injunction

A party who knowingly violates the discharge injunction under § 524(a)(2) can be held in contempt under § 105(a). "The standard for finding a party in civil contempt

is well settled: The moving party has the burden of showing by clear and convincing evidence that the contemnors violated a specific and definite order of the court. The burden then shifts to the contemnors to demonstrate why they were unable to comply." *In re Bennett*, 298 F.3d at 1069. In *Bennett*, the Ninth Circuit went on to say that "[a]s discussed by the Eleventh Circuit in *Hardy*, to justify sanctions, the movant must prove that the creditor (1) knew the discharge injunction was applicable and (2) intended the actions which violated the injunction." *Id.* (citing *In re Hardy*, 97 F.3d at 1390 (citing *Jove Eng'g, Inc. v. Internal Revenue Serv.*, 92 F.3d 1539, 1555 (11th Cir. 1996))).

Later, in *Dyer* the Ninth Circuit again cited *Hardy* in connection with its analysis regarding the distinction between sanctions authorized for a "willful" violation of the automatic stay under § 362(k) and those imposed under the bankruptcy court's contempt power contained in § 105(a). The Ninth Circuit explained that "[i]n determining whether the contemnor violated the stay, the focus 'is not on the subjective beliefs or intent of the contemnors in complying with the order, but whether in fact their conduct complied with the order at issue.'" 322 F.3d at 1190 (citing *In re Hardy*, 97 F.3d at 1390; *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949) (Because civil contempt serves a remedial purpose, "it matters not with what intent the defendant did the prohibited act.")). The Ninth Circuit subsequently noted:

> Under both [§ 362(k) and § 105(a)], the threshold question regarding the propriety of an award turns not on a finding of 'bad faith' or subjective intent, but rather

> on a finding of 'willfulness,' where willfulness has a particularized meaning in this context:
>
> '[W]illful violation' does not require a specific intent to violate the automatic stay. Rather, the statute provides for damages upon a finding that the defendant knew of the automatic stay and that the defendant's actions which violated the stay were intentional.'

322 F.3d at 1191 (quoting *Havelock v. Taxel (In re Pace)*, 67 F.3d 187, 191 (9th Cir. 1995)) (citing *In re Hardy*, 97 F.3d at 1390).

The *Dyer* court further expounded on the actual knowledge aspect of "willful" for contempt by noting that unlike § 362(k), where a party with knowledge of bankruptcy proceedings is charged with knowledge of the automatic stay, in the context of contempt, actual knowledge of the automatic stay is required. *Id.* at 1191–92 ("Generally, a party cannot be held in contempt for violating an injunction absent knowledge of that injunction."). Applying these principles, the Ninth Circuit declined to affirm the bankruptcy court's decision finding Mr. Lindblade and his attorney in contempt because it was not clear that they were aware of the automatic stay injunction at the time they recorded a deed of trust. The court opined: "They may not have been familiar with that particular Code provision." *Id.* at 1191;[10] *see also In re Zilog*, 450 F.3d at 1008 (noting that *Dyer* "simply reiterates the well-established proposition that only actual

---

[10] Ultimately the Ninth Circuit affirmed on a different ground which is not relevant here.

knowledge of the discharge injunction suffices for a finding of contempt").

Three years later in *Zilog*, the Ninth Circuit again reiterated its approval of *Hardy's* two-part test for finding a willful violation of the discharge injunction as stated in *Bennett* and *Dyer*. *In re Zilog*, 450 F.3d at 1007, 1008 n. 12 (noting that a contempt order entered for violation of the automatic stay or discharge injunction is governed by the same standards, namely those applicable to all civil contempt proceedings). In *Zilog*, the Ninth Circuit provided further guidance on the "actual knowledge" requirement under the first prong of the test. First, the court made clear that whether a party has actual knowledge of the injunction is a fact-based inquiry and must be found; it can neither be presumed nor imputed. *In re Zilog*, 450 F.3d at 1007–08. Second, the Ninth Circuit further explained there must be evidence showing that the alleged contemnor was aware of the discharge injunction and that it was applicable to his or her claim. *Id.* at 1009.

> To be held in contempt, the [alleged contemnors] must not only have been aware of the discharge injunction, but must also have been aware that the injunction applied to their claims. To the extent that the deficient notices led the [alleged contemnors] to believe, even unreasonably, that the discharge injunction did not apply to their claims because they were not affected by the bankruptcy, this would preclude a finding of willfulness. *Id.* at n. 14.

Taken together, *Bennett*, *Dyer*, and *Zilog*, demonstrate that the Ninth Circuit has crafted a strict standard for the actual knowledge requirement in the context of

contempt before a finding of willfulness can be made. This standard requires evidence showing the alleged contemnor was aware of the discharge injunction *and* aware that it applied to his or her claim. Whether a party is aware that the discharge injunction is applicable to his or her claim is a fact-based inquiry which implicates a party's subjective belief, even an unreasonable one. Of course, subjective self-serving testimony may not be enough to rebut actual knowledge when the undisputed facts show otherwise. *See Chionis v. Starkus (In re Chionis)*, BAP No. CC–12–1501–KuBaPa, 2013 WL 6840485, at *6 (9th Cir. BAP Dec. 27, 2013) (reversing the bankruptcy court's finding that actual knowledge of the discharge injunction was not shown based on alleged contemnor's self-serving testimony when the undisputed facts showed otherwise).

With respect to the second prong—the intent requirement for a finding of willfulness—the analysis concerning a "willful" violation of the discharge injunction is the same as a finding of willfulness in connection with violation of the automatic stay under § 365(k). In connection with the second prong's intent requirement, we have previously observed that "the bankruptcy court's focus is not on the offending party's subjective beliefs or intent, but on whether the party's conduct in fact complied with the order at issue." *Rosales v. Wallace (In re Wallace)*, BAP No. NV–11–1681–KiPaD, 2012 WL 2401871, at *5 (9th Cir. BAP June 26, 2012) (citing *Bassett v. Am. Gen. Fin. (In re Bassett)*, 255 B.R. 747, 758 (9th Cir. BAP 2000), *rev'd on other grounds*, 285 F.3d 882 (9th Cir. 2002) (stating that courts have applied an objective test in determining whether an injunction should be enforced via the contempt power) (citing *In re Hardy*, 97 F.3d at 1390); *see*

also In re Dyer, 322 F.3d at 1191 (noting that a "willful violation" does not require a specific intent to violate the automatic stay).

Accordingly, each prong of the Ninth Circuit's two-part test for a finding of contempt in the context of a discharge violation requires a different analysis, and distinct, clear, and convincing evidence[11] supporting that analysis, before a finding of willfulness can be made. This is consistent with the Ninth Circuit's reluctance "to hold an unwitting creditor in contempt." *In re 1601 W. Sunnyside Dr. # 106, LLC*, 2010 WL 5481080, at *4 (Bankr.D.Idaho Dec. 30, 2010).

B. The *Ybarra* Rule

While a discharge in bankruptcy generally relieves a debtor from all prepetition debts, the Ninth Circuit has adopted a different standard for determining for discharge purposes when an attorney's fee claim arises. "Under that standard, even if the underlying claim arose prepetition, the claim for fees incurred postpetition on account of that underlying claim is deemed to have arisen postpetition if the debtor 'returned to the fray' postpetition by voluntarily and affirmatively acting to commence or resume the litigation with the creditor." *Bechtold v. Gillespie (In re Gillespie)*, 516 B.R. 586, 591 (9th Cir.

---

[11] The clear and convincing evidence standard requires the moving party to "place in the ultimate factfinder an abiding conviction that the truth of its factual contentions are 'highly probable.'" *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984). Factual contentions are highly probable if the evidence offered in support of them "instantly tilt[s] the evidentiary scales in the affirmative when weighed against the evidence [the non-moving party] offered in opposition." *Id.*

BAP 2014) (citing *In re Ybarra*, 424 F.3d at 1026–27). The rule is invoked to prevent a debtor from using the discharge injunction as a sword that enables him or her to undertake risk-free postpetition litigation at others' expense. *Id.* (citing *In re Ybarra*, 424 F.3d at 1026). "The *Ybarra* rule applies regardless of whether the litigation begins prepetition or postpetition, regardless of the nature of the underlying claim, and regardless of the forum in which the postpetition litigation takes place." *Id.* at 591–92 (citing *In re Ybarra*, 424 F.3d at 1023–24).

C. Analysis

Due to the *Ybarra* rule, the scope of the discharge order here was ambiguous with respect to the post-discharge attorneys' fees and costs. Whether a debtor voluntarily returns to the fray under the *Ybarra* rule is a factual question subject to dispute as demonstrated by the state and bankruptcy courts' ruling on the one hand, and the district court's ruling the other hand. A creditor seeking to invoke the *Ybarra* rule would necessarily need to seek such a determination from a court.

Section 524(a)(2) clearly was not designed to prohibit actions that seek an *Ybarra* determination. We have previously said that a party seeking a bankruptcy court determination regarding the scope of the discharge should file an adversary complaint seeking declaratory relief. *See Ruvacalba v. Munoz (In re Munoz)*, 287 B.R. 546, 556 (9th Cir. BAP 2002). Appellants' request for a *Ybarra* ruling in the state court was essentially the same as a request for declaratory relief regarding the scope of the discharge. We fail to see how following this procedure equates to a violation of § 524(a)(2). On Debtor's novel

theory of the discharge, any person, creditor or non-creditor, who sought declaratory relief regarding the scope of the discharge injunction would forever be barred, under pain of contempt sanctions, from filing an adversary proceeding to seek a court's ruling on the issue.[12] Appellants should be praised, not sanctioned, for having followed a correct procedure to resolve the *Ybarra* issue.

Further, once the state court decided that the discharge did not bar Appellants' claim for attorneys' fees, Appellants were entitled to rely on that decision. A party who acts in reliance on a facially valid determination that the discharge does not apply cannot be guilty of "willfully" violating the discharge injunction.[13]

---

[12] At oral argument, Debtor's attorney took the position that Appellants proceeded in the state court at their own risk since only the bankruptcy court had authority to decide the scope of the injunction. This proposition is not correct. In *Pavelich v. McCormick, Barstow, Sheppard, Wayte & Carruth LLC (In re Pavelich)*, 229 B.R. 777 (9th Cir. BAP 2000), we noted: "With respect to the discharge itself, state courts have the power to construe the discharge and determine whether a particular debt is or is not within the discharge." *Id.* at 783. The Panel further stated that if the state court construes the discharge correctly, its judgment will be enforced. However, if the state court construed the discharge incorrectly, then its judgment may be void and subject to collateral attack in federal court. To the extent Debtor collaterally attacked the state court's ruling in the bankruptcy court, the bankruptcy court not only upheld the state court's ruling, but independently found that he had entered the fray under *Ybarra*.

[13] One might argue that, because a state court decision incorrectly construing the scope of the discharge is not only erroneous, but also void, *In re Pavelich*, 229 B.R. at 782, reliance on such a determination is no defense. But, as we explain below, in order to recover for a violation of the discharge injunction, the debtor must establish the actor's subjective state of mind. In this case, there is no reason to think

Even if Appellants had not raised the *Ybarra* question to the state court, we would overturn the bankruptcy court's decision on other grounds. Although the bankruptcy court recited the *Zilog* test, it applied the wrong legal standard for determining whether Appellants had the sort of actual knowledge necessary for a finding of willfulness. As a result, its factual findings were clearly erroneous.

Despite citing the two-part test in *Hardy* with approval in *Bennett*, *Dyer*, and *Zilog*, the Ninth Circuit has never adopted the test word for word. Under the first prong, the *Hardy* test states that a defendant will be held in contempt if it "knew that the [discharge injunction] was invoked." Since adopting the *Hardy* test, the Ninth Circuit has always replaced the word "invoked" with the word "applicable." Therefore, the bankruptcy court erred when it relied on the *Hardy* test rather than using the Ninth Circuit's test as restated.

By adopting the *Hardy* test, the bankruptcy court improperly "charged" Appellants with actual knowledge of the discharge injunction simply because it had been entered at the time they sought their attorneys' fees in the state court. Rather than conducting any inquiry into whether Appellants were aware that the discharge injunction applied to their fee request as instructed in *Zilog*, the court imputed such awareness by strict liability. It is certainly possible that Appellants held an objectively reasonable belief that, for reasons specific to Debtor's conduct in the state court, the discharge injunction did

---

that Appellants subjectively knew or believed that the state court's decision was wrong.

not apply to their post-discharge attorneys' fee request under the *Ybarra* rule. In any event, as stated above, they followed the proper procedure by seeking the court's decision on the scope of the discharge.

The bankruptcy court also improperly found that Appellants were not "insulated" from a willfulness finding after the state court and bankruptcy court found in their favor—apparently on the basis that the state court got it wrong and the bankruptcy court was reversed by the district court. This reasoning is more in line with the standard for finding a willful violation of the automatic stay under § 362(k), where a legitimate dispute as to a creditor's right to take the action that violates the automatic stay may not relieve a willful violator of the consequences of his or her act.

Finally, the court concluded that Appellants' subjective or good faith beliefs were irrelevant. Although this strict liability analysis may be either consistent with the standards for a willful violation of the automatic stay because there is no specific intent requirement embedded in § 362(k) or with an analysis under the second prong of the test for deciding willfulness, it cannot apply to the first prong of the discharge violation test which requires actual knowledge of applicability.

Taken together, the bankruptcy court's "strict liability" analysis is closer to the standards for finding a willful violation of the automatic stay under § 362(k), which is the derivation of the *Hardy* test. Alternatively, at best, the court's analysis conflated the objective inquiry under the second prong of the willfulness test regarding intent with the fact intensive inquiry under the actual knowledge requirement in the first prong.

Due to the application of an improper legal standard, the bankruptcy court's factual findings regarding Appellants' actual knowledge are clearly erroneous and not supported by the record. It is undisputed that Appellants had actual knowledge that Debtor's discharge had been entered at the time they sought the post-discharge attorneys' fees under the *Ybarra* rule in the state court. However, they could not possibly have been aware that the discharge injunction was applicable to their fee request until the *Ybarra* question was adjudicated. Once the bankruptcy court confirmed the state court's ruling and made its own independent decision on the matter, ruling in Appellants favor, all doubts regarding whether the discharge injunction applied were resolved; i.e., under *Ybarra*, the post-discharge fee request fell outside the scope of the discharge injunction. The bankruptcy court's ruling was binding on Debtor and SPBC until it was overruled.[14]

This is not a case where Appellants knew of the discharge injunction and continued to press their attorneys' fee claim in the state court under the assumption that the discharge injunction did not apply to them. Rather, all along the way, they sought a judicial determination that the discharge injunction did not apply. We fail to see how the *Zilog* standard for actual knowledge is met under these facts.

In the end, there is no clear and convincing evidence in the record that shows Appellants had actual knowledge

---

[14] While Debtor suggests that Appellants were dilatory in vacating the Supplemental Judgment, this was not a basis for the bankruptcy court's ruling.

that the discharge injunction applied to their post-discharge fee request in the state court. The facts actually suggest the opposite. Although the discharge order was in place at the time Appellants made their fee request in the state court, the order itself did not advise Appellants of the scope of the injunction under the *Ybarra* rule. Nor could it, since that was up to a court of competent jurisdiction to decide the question as to whether Debtor voluntarily returned to the fray.

VI. CONCLUSION

For the reasons stated, we REVERSE the bankruptcy court's finding of contempt and VACATE its judgment awarding sanctions.

APPENDIX D

UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF OREGON

No. 09-39216-rld7

In re: BRADLEY WESTON TAGGART, Debtor.

Filed: December 16, 2014

MEMORANDUM OPINION

RANDALL L. DUNN, Bankruptcy Judge.

Factual Summary[1]

Bradley Weston Taggart ("Mr.Taggart) filed a Chapter 7[2] petition on the eve of trial in litigation in Washington County, Oregon Circuit Court ("Litigation") through

---

[1] This factual summary is brief. A detailed recitation of the underlying facts can be found in (1) this court's Memorandum Opinion entered December 9, 2011 (#64 on the docket), (2) the Opinion and Order entered August 7, 2012 on Mr. Taggart's appeal to the United States District Court for the District of Oregon (#105 on the docket), and (3) a decision of the Oregon Court of Appeals with respect to an appeal of the supplemental judgment entered postpetition in the Litigation (*see Sherwood Park Business Center, LLC v. Taggart*, – P.3d –, 2014 WL 6693829 (Or. App.) (November 26, 2014)).

[2] Unless otherwise indicated, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101–1532, and all "Rule" references are to the Federal Rules of Bankruptcy Procedure, Rules 1001–

which Sherwood Park Business Center, LLC ("SPBC")[3] asserted claims against Mr. Taggart for breach of fiduciary duty, expulsion, breach of contract, attorneys fees and declaratory relief. The claims arose from (1) Mr. Taggart's conduct as the managing member of SPBC, in which he held a 25% member interest, and (2) the validity of Mr. Taggart's attempted transfer of that member interest. The filing of the petition stayed the Litigation.

Mr. Taggart's chapter 7 discharge was entered February 23, 2010. Thereafter, the other SPBC members, Terry W Emmert ("Mr. Emmert") and Keith Jehnke ("Mr. Jehnke"), represented by attorney Stuart M. Brown ("Mr. Brown")[4] (collectively, "Respondents"), resumed the Litigation for the purpose of expelling Mr.

9037. The Federal Rules of Civil Procedure are referred to as "Civil Rules."

[3] In his Trial Brief on Remand, Mr. Taggart makes an assertion that directly calls into question whether I am disinterested in this matter: "The Operating Agreement was prepared by the Landye, Bennett firm. The form of the Operating Agreement may even have been crafted or used by this Court."

Landye, Bennett is the law firm at which I was managing partner before my appointment to the bench on February 1, 1998. For the record, SPBC's operating agreement reflects that SPBC was organized October 12, 1999. *See* Exhibit 1, at p. 18. Whether the Landye, Bennett firm may have continued to use a form to which I may have contributed my work product as an attorney does not mean that I prepared the SPBC operating agreement. Regardless, I am not called upon to interpret the operating agreement in these proceedings. All I am asked to decide is to review the knowledge and actions of the Respondents after February 23, 2010.

[4] Mr. Brown is now deceased. Shelley A. Lorenzon, the executor of Mr. Brown's estate, is the successor party for Mr. Brown's position.

Taggart from the SPBC. Mr. Taggart moved both to quash his scheduled deposition and to dismiss the Litigation on the basis of the bankruptcy discharge. However, the state court determined that Mr. Taggart was an essential party to resolving the SPBC member expulsion claim and allowed the Litigation to proceed with the proviso that no money judgment would be entered against Mr. Taggart.

Ultimately, the state court entered its "General Judgment" in favor of SPBC which deemed Mr. Taggart's attempted transfer of his member interest null and void. As relevant to the matter before me, the General Judgment expelled Mr. Taggart as a member of SPBC effective January 1, 2008, based upon his wrongful conduct under the operating agreement. The General Judgment awarded Mr. Emmert and Mr. Jehnke the right to purchase Mr. Taggart's member interest on the following terms:

> The purchase price shall be the fair market value of [SPBC] as of the date of entry of judgment multiplied by Taggart's 25% membership interest, less any unpaid postpetition attorney fees, costs and prevailing party fees which might be assessed against Taggart pursuant to ORCP 68 and ORS Chapter 20 and necessary proceedings in bankruptcy court or this court.

Respondents then initiated proceedings in the Litigation to recover postpetition attorney fees against Mr. Taggart to be used as an offset against the purchase price of his member interest. An attorney fee award was sought

---

For clarity I will continue to refer to the actions taken and positions asserted as those of Mr. Brown.

both by SPBC based on litigating the expulsion claim and separately by Mr. Emmert and Mr. Jehnke based on litigating the transfer of Mr. Taggart's member interest. SPBC sought a fee award against Mr. Taggart personally. Mr. Emmert and Mr. Jehnke sought an award against the alleged purchaser of Mr. Taggart's member interest. Mr. Taggart again asserted that his bankruptcy discharge precluded the imposition of such fees against him. Citing the Ninth Circuit's decision in *Boeing North American, Inc. v. Ybarra (In re Ybarra)*, 424 F.3d 1018 (9th Cir. 2005), the state court determined that Mr. Taggart had voluntarily returned to the fray, with the result that bankruptcy discharge did not preclude an award of postpetition attorney fees against him in favor on SPBC. The state court then entered its "Supplemental Judgment," which awarded SPBC $45,404.30 in attorney fees and costs from Mr. Taggart. The state court determined that Mr. Emmert and Mr. Jehnke were not entitled to a fee award against the alleged purchaser of Mr. Taggart's member interest.

In response to entry of the Supplemental Judgment, Mr. Taggart filed in this court his Motion to Hold Stuart M. Brown, Terry W. Emmert and Keith Jehnke in Contempt for Violating Discharge Injunction Under 11 U.S.C. § 524 ("Contempt Motion").[5] I denied the Contempt Motion following an evidentiary hearing held November 14, 2011 ("2011 Hearing"), on the basis that the state court had correctly determined that Mr. Taggart

---

[5] An alleged violation of the discharge injunction is pursued, as in this case, by a motion invoking the contempt remedies allowed for in § 105(a). *See Walls v. Wells Fargo Bank, N.A.*, 276 F.3d 502, 509–10 (9th Cir. 2002).

had voluntarily returned to the fray such that *Ybarra* precluded a finding that the discharge injunction had been violated.

On Mr. Taggart's appeal, the United States District Court for the District of Oregon reversed based on its conclusion after de novo review that Mr. Taggart had not voluntarily returned to the fray postpetition within the meaning of *Ybarra*. The Respondents' appeal to the Ninth Circuit was dismissed as interlocutory. The Contempt Motion therefore is before me once again on remand.

Following further briefing and oral argument held November 7, 2014 ("2014 Hearing"), I took determination of the Contempt Motion under advisement.[6]

In deciding this matter, I have considered carefully the testimony presented at the 2011 Hearing on the Contempt Motion, the exhibits admitted at the 2011 Hearing, the supplemental exhibits filed in advance of the 2014 Hearing, and the arguments presented, both in legal memoranda and orally. I further have taken judicial notice of the docket and documents filed in Mr. Taggart's chapter 7 case for the purpose of confirming and ascertaining facts not reasonably in dispute. Federal Rule of Evidence 201; *In re Butts*, 350 B.R. 12, 14 n.1 (Bankr. E.D. Pa 2006). In addition, I have reviewed relevant legal

---

[6] The current proceedings have been limited to issues regarding liability only. If I decide the Contempt Motion in favor of Mr. Taggart, further proceedings will be scheduled with respect to Mr. Taggart's damages claims.

authorities both as cited to me by the parties and as located through my own research.

In light of that consideration and review, this Memorandum Opinion sets forth the court's findings of fact and conclusions of law under Civil Rule 52(a), applicable with respect to this contested matter under Rules 7052 and 9014.[7]

Jurisdiction

I have jurisdiction to decide the Contempt Motion under 28 U.S.C. §§ 1334, 157(b)(1) and 157(b)(2)(I) and (*O*).

Discussion

As in my prior Memorandum Opinion, the ultimate question before me is whether, in seeking the Supplemental Judgment, the Respondents violated the discharge injunction provided for in § 524(a)(2).[8]

---

[7] This matter, like the underlying Litigation, has been contentious at every step of the way. Accordingly, I expect to be appealed no matter how I decide. As an aid to the parties in their further contests, I note that the standard for review of decisions on motions for contempt in the Ninth Circuit is abuse of discretion. "We review the decision to impose contempt for abuse of discretion, and underlying factual findings for clear error." *Knupfer v. Lindblade (In re Dyer)*, 322 F.3d 1178, 1191 (9th Cir. 2003), citing *FTC v. Affordable Media*, 179 F.3d 1228, 1239 (9th Cir. 1999).

[8] Section 524(a)(2) provides that, "A discharge in a case under this title—(2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived. . . ."

An alleged contemnor's violation of the discharge injunction must be "willful" in order to be subject to sanctions for violating the discharge injunction. Under Ninth Circuit law, I apply a two-part test to determine whether the alleged violation was willful. I must find first, that the alleged contemnor knew that the discharge injunction applied, and second, that the alleged contemnor intended the actions that violated the discharge injunction. *See Zilog, Inc. v. Corning (In re Zilog, Inc.)*, 450 F.3d 996, 1007 (9th Cir. 2006); *Hardy v. United States (In re Hardy)*, 97 F.3d 1384, 1390 (9th Cir. 1996). The burden of proof for the moving party is clear and convincing evidence. *See In re Zilog, Inc.*, 450 F.3d at 1007; *Renwick v. Bennett (In re Bennett)*, 298 F.3d 1059, 1069 (9th Cir. 2002) ("The moving party has the burden of showing by clear and convincing evidence that the contemnors violated a specific and definite order of the court.").

1. *Did the Respondents Know the Discharge Injunction "Applied" ?*

Respondents contend that the first part of the *Zilog* test requires that I find that they knew that Mr. Taggart's discharge "applied" to the proceedings which resulted in the Supplemental Judgment. They suggest the phrasing precludes a finding of willfulness because they held a good faith belief that the discharge injunction did not apply in the Supplemental Judgment proceedings. In effect, I am asked to decide whether a good faith belief that the discharge injunction does not apply to proceedings vitiates the Respondents' knowledge that the discharge injunction was in existence. I hold that it does not. My reasons follow.

In *Zilog*, the Ninth Circuit states:

> A party who knowingly violates the discharge injunction can be held in contempt under section 105(a) of the bankruptcy code. [*See In re Bennett*, 298 F.3d 1059, 1069 (9th Cir. 2002)] ... In *Bennett*, ... [w]e cited with approval the standard adopted by the Eleventh Circuit for violation of the discharge injunction: "[T]he movant must prove that the creditor (1) knew the discharge injunction was applicable and (2) intended the actions which violated the injunction." *Bennett*, 298 F.3d at 1069 (citing *Hardy v. United States (In re Hardy)*, 97 F.3d 1384, 1390 (11th Cir. 1996)).

Since the Ninth Circuit expressly adopted the Eleventh Circuit's willfulness test as set forth in *Hardy*, I reviewed the language in *Hardy* as the source for the test. In *Hardy*, the Eleventh Circuit extended its previously established test for determining whether a violation of the automatic stay was willful.

> In [*Jove Engineering, Inc. v. Internal Revenue Service*, 92 F.3d 1539 (11th Cir. 1996)], this court adopted a two-pronged test to determine willfulness in violating the automatic stay provision of § 362. Under this test the court will find the defendant in contempt if it: "(1) knew that the automatic stay *was invoked* and (2) intended the actions which violated the stay." *Jove*, 92 F.3d at 1555 [emphasis added]. This test is likewise applicable to determining willfulness for violations of the discharge injunction of § 524.

Hardy, 97 F.3d at 1390.

Whether the Respondents knew the discharge was "invoked" is a simple fact-based inquiry. It does not allow for the subjective belief, good faith or otherwise, regarding whether, as a legal matter, the discharge applied to

the proceedings. This premise is reinforced in the case law. "In determining whether the contemnor violated the stay, the focus 'is not on the subjective beliefs or intent of the contemnors in complying with the order, but whether in fact their conduct complied with the order at issue.'" *In re Dyer*, 322 F.3d at 1191 (quoting *Hardy*, 97 F.3d at 1390).[9]

Hardy, as adopted by the Ninth Circuit, in effect imposes a strict liability standard as the first element of the willfulness test: "If the court on remand finds, as plaintiff claims, that IRS received notice of Mr. Hardy's discharge in bankruptcy, and was thus aware of the discharge injunction, Mr. Hardy will then have to prove only that the IRS intended the actions which violate the stay." *Hardy*, 97 F.3d at 1390.

In *Lone Star Security & Video, Inc. v. Gurrola (In re Gurrola)*, 328 B.R. 158, 175 (9th Cir. BAP 2005), the Panel highlighted the sanctity of the discharge injunction, stating that once entered, it was "good against the world." Respondents had a duty to obey the discharge injunction. Only lack of notice of the discharge may serve as a defense to contempt sanctions. *Id.*

---

[9] Because courts have equated the willfulness test for automatic stay violations with that for discharge injunction violations, case law discussing automatic stay violations is instructive. The Ninth Circuit BAP has held that in automatic stay violation cases a finding of willfulness merely requires that the creditor know of the automatic stay and that the actions that violate the stay be intentional. No specific intent is required; a good faith belief that the stay is not being violated "is not relevant to whether the act was 'willful' or whether compensation must be awarded." *Morris v. Peralta (In re Peralta)*, 317 B.R. 381, 389 (9th Cir. BAP 2004).

To the extent Respondents suggest that the state court's ruling that *Ybarra* applied to render the Supplemental Judgment proceedings outside the scope of the discharge injunction insulates them from a willfulness finding, I disagree. As I stated in my prior Memorandum Opinion, the state court had "jurisdiction to construe the bankruptcy discharge correctly, but not incorrectly." *Pavelich v. McCormick, Barstow, Sheppard, Wayte & Carruth, LLP (In re Pavelich)*, 229 B.R. 777, 784 (9th Cir. BAP 1999). *See Huse v. Huse–Sporsem, A.S. (In re Birting Fisheries, Inc.)*, 300 B.R. 489, 500 (9th Cir. BAP 2003). The District Court determined that the state court construed the scope of Mr. Taggart's discharge incorrectly. Neither is my prior determination that the state court correctly determined *Ybarra* 's impact on the Supplemental Judgment proceedings helpful to Respondents where it was reversed on appeal.

At the November 2011 Hearing, Mr. Brown testified that after discussion with his co-counsel, he would seek attorney fees postpetition

> . . . for fees from the date the notice of discharge was filed. I think that was February 23rd of . . . 2010.
>
> . . . Technically we could have gone back to [the petition date] . . . but as a practical matter it didn't make any sense. You know, we're not going to get attorney fees from Mr. Taggart in any event except for the offset.

Tr. Of November 2011 Hearing at 83:25–84:9 [Exhibit T]. Thus, it is not disputed that Respondents had actual knowledge that Mr. Taggart's bankruptcy discharge had been entered at the time they sought the Supplemental

Judgment. As such, they are charged with knowledge of the discharge injunction.

Respondents point out that the Supplemental Judgment was awarded only in favor of SPBC. Mr. Brown asserted that because he did not represent SPBC, he could not be held accountable for the actions that resulted in a fee award in favor of SPBC.

However, the record reflects that it was Mr. Brown who prepared and submitted the Supplemental Judgment which resulted in the award of fees in favor of SPBC and against Mr. Taggart. *See* Exhibit 27. When questioned about how he came to submit the judgment on behalf of SPBC, Mr. Brown testified:

> [I]n filing the petition for the judgment, the motion to enter the judgment, and the petition for fees, we [Mr. Brown and SPBC's attorney of record] had a discussion, and the discussion was whether both attorneys needed to file their own or whether one could do it and the other one join. And we decided to go the latter way to save money.

October 12, 2001 Deposition of Mr. Brown at 16:22–17:3 [Exhibit S].

Mr. Emmert and Mr. Jehnke also assert that they cannot be held accountable personally for any action resulting in the Supplemental Judgment, either because the award was in favor of SPBC or because they relied on the advice of their counsel. Mr. Brown testified that he had advised Mr. Emmert and Mr. Jehnke that if a court determined that Mr. Taggart had not returned to the fray, the discharge injunction would preclude a recovery of attorneys fees. *Id.* at 18:3–19:1. Thus, Mr. Emmert and Mr.

Jehnke were on notice that seeking fees from Mr. Taggart might implicate the discharge injunction.

I find that Mr. Taggart has established the first element of the willfulness test by clear and convincing evidence.

2. *Respondents Intended the Actions Which Violated the Injunction.*

By initiating and pursuing proceedings to obtain the Supplemental Judgment, the Respondents violated the discharge injunction. There is no dispute in the record that they intended those actions. As previously stated, Mr. Brown testified he prepared and submitted the Supplemental Judgment. Because Mr. Brown would not have proceeded without approval from his clients, and because the record does not reflect that Mr. Emmert and Mr. Jehnke have at any time asserted they did not instruct Mr. Brown to proceed to seek attorney fees against Mr. Taggart, they also intended the actions that led to the entry of the Supplemental Judgment. I therefore find that Mr. Taggart has established the second element of the willfulness test by clear and convincing evidence.

3. *Consequences From the Violation of the Discharge Injunction.*

Three consequences flow from the above findings.

First, the Supplemental Judgment is void, having been entered in violation of the discharge injunction. *See* § 524(a)(1).[10]

---

[10] The Oregon Court of Appeals reversed the entry of the Supplemental Judgment on appeal.

Second, having proven both elements of the willfulness test, Mr. Taggart is entitled to entry of an order holding the Respondents in contempt of for violating his discharge injunction.

Third, Mr. Taggart is entitled to an evidentiary hearing to determine the appropriate amount of sanctions damages this court should impose against Respondents.

Conclusion

Based on the foregoing findings of fact and conclusions of law, I will enter an order holding Respondents in contempt. Further proceedings are appropriate to determine the amount of sanctions damages warranted under the circumstances.

APPENDIX E

UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF OREGON

No. 09-39216-rld7

In re: BRADLEY WESTON TAGGART,
Debtor.

Filed: March 17, 2015

MEMORANDUM OPINION

RANDALL L. DUNN, Bankruptcy Judge:

Following the entry of the Memorandum Opinion (Docket No. 158) and the Order on Motion for Contempt (Docket No. 159) on Bradley Weston Taggart's ("Mr. Taggart") First Amended Motion for Contempt ("Contempt Motion") (Docket No. 42) against Stuart M. Brown ("Mr. Brown"), Terry W. Emmert ("Mr. Emmert"), Keith Jehnke ("Mr. Jehnke") and Sherwood Park Business Center, LLC ("SPBC") (collectively, "Respondents"), I held a hearing ("Hearing") on February 27, 2015 to hear evidence on Mr. Taggart's damages claims. At the Hearing, I admitted Mr. Taggart's Exhibits 28, 29 and 30, without objection; I heard the testimony of Mr. Taggart; and I heard argument and engaged in discussion with counsel. At the end of the Hearing, I closed the evidentiary record.

In addition, the declarations of Mr. Taggart's counsel, John M. Berman and Damon J. Petticord, with itemizations of time and expenses attached, were submitted to support Mr. Taggart's request for an award of attorneys' fees and costs. Since the declarations of counsel only recently had been submitted, I granted counsel for the Respondents until Friday, March 6, 2015, to file any objections to the requested fees and costs. Counsel for the estate ("Estate") of Mr. Brown, who is deceased, advised me by letter that the Estate would not be filing an objection to the fee request of Mr. Taggart's counsel. However, counsel for the other Respondents filed an objection ("Fee Objection") to the request for fees and costs of Mr. Taggart's counsel on March 6, 2015, and Mr. Taggart's counsel filed a response ("Response") to the Fee Objection on March 8, 2015. With these final submissions, I took the matter under advisement.

In considering appropriate damages determinations, I have considered carefully the evidence and arguments presented, focusing particularly on Mr. Taggart's testimony and the declarations of Mr. Berman and Mr. Petticord. In addition I have reviewed relevant legal authorities, both as cited to me by the parties and as discovered through my own research.

Based on that consideration and review, I have come to a decision on what awards of damages are appropriate in this matter. Following are my findings of fact and legal conclusions under Civil Rule 52(a), applicable with respect to this matter under Rules 7052 and 9014.[1]

---

[1] Unless otherwise indicated, all chapter and section references are to the federal Bankruptcy Code, 11 U.S.C. §§ 101–1532; all "Rule"

Damages for Civil Contempt

Mr. Taggart requests awards of damages in three categories, each of which I address in turn, as follows:

A. *Actual Damages*

In the Contempt Motion, Mr. Taggart requested emotional distress damages of $50,000, resulting from stress and its physical manifestations. The Ninth Circuit has held, in the context of a claim for violation of the automatic stay under § 362(h) (now, § 362(k)), that in order for an individual to be entitled to damages for emotional distress, the individual must (1) suffer significant harm, (2) clearly establish the harm, and (3) demonstrate a causal connection between the harm and the claimed violation, distinct "from the anxiety and pressures inherent in the bankruptcy process." *Dawson v. Washington Mutual Bank, F.A. (In re Dawson)*, 390 F.3d 1139, 1149 (9th Cir. 2004). The Ninth Circuit concluded that if an individual established that he "suffered significant emotional harm and the circumstances surrounding the violation make it obvious that a reasonable person would suffer significant emotional harm," such proof would suffice "even in the absence of corroborating evidence." *Id.* at 1151. Judge Brown concluded that emotional distress damages appropriately could be awarded with respect to a contempt claim based on an alleged violation of the discharge injunction, subject to the standards set forth in *Dawson*. *In re Feldmeier*, 335 B.R. 807, 812–14 (Bankr. D. Or. 2005).

---

references are to the Federal Rules of Bankruptcy Procedure, Rules 1001–9037; and all "Civil Rule" references are to the Federal Rules of Civil Procedure.

Accord In re Culpepper, 481 B.R. 650, 660 (Bankr. D. Or. 2012).

At the Hearing, Mr. Taggart testified that he suffered chronically from a psoriasis condition. According to Wikipedia, "**Psoriasis** . . . is a common, chronic, relapsing/remitting, immune-mediated systemic disease characterized by skin lesions including red, scaly patches, papules, and plaques, which usually itch," which is essentially how Mr. Taggart described his condition. Mr. Taggart testified that his psoriasis, which came and went based on his stress levels, had come under control when he received his bankruptcy discharge, and his slate of debts had been wiped clean. However, from the time when the Respondents began their efforts to obtain a personal judgment against him in state court for attorneys' fees and obtained such judgment, Mr. Taggart's psoriasis had flared up, not only on his scalp (where he previously had experienced manifestations of the condition), but on other parts of his body as well. His symptoms included not only the typical lesions, but further included open wounds with bleeding. Mr. Taggart also began experiencing difficulties sleeping. He consulted a doctor on at least one occasion in April 2013, but he had no funds to pay for medical care, and the only specific cost for treatment that he could identify was $100 spent for a tube of medicating ointment. Mr. Taggart did not present any corroborating medical evidence or supporting testimony from family members, friends or co-workers as to his stress levels or medical condition.

At the outset, I found Mr. Taggart's testimony as to the stress and physical consequences that resulted to him from the Respondents' post-discharge actions credible. Accordingly, I find that it is appropriate to award Mr.

Taggart some damages for the emotional stress and psoriasis-related physical problems that he has experienced post-discharge. However, as readily admitted at the Hearing by Mr. Taggart's counsel, such damages are difficult to quantify because, frankly, there is no specific standard by which to measure such damages.

There is no question in my mind, after all of the proceedings to date related to the Contempt Motion, that Mr. Taggart's relationship with the Respondents has had a long and bitter history, and that historically poisoned relationship undoubtedly has had an impact on the stress that Mr. Taggart experienced in dealing with the Respondents and, unfortunately, will continue to have an impact with respect to the surviving Respondents after this proceeding is finally resolved. I also recognize that the entire process of going through bankruptcy is stressful. So, not all of Mr. Taggart's emotional and physical distress can be attributed to the post-discharge conduct of the Respondents.

That said, my ultimate finding and conclusion is that under the *Dawson/Feldmeier* standards, Mr. Taggart is entitled to an award of damages for substantial harm in terms of his emotional distress and its physical manifestations caused by the post-discharge conduct of the Respondents in violation of the discharge injunction in the amount of $5,000, awarded jointly and severally against the Respondents.

B. *Attorneys' Fees and Costs*

As the Ninth Circuit has stated, "We emphasize that attorneys' fees are an appropriate component of a civil contempt award." *Knupfer v. Lindblade (In re Dyer)*, 322

F.3d 1178, 1195 (9th Cir. 2003), citing *Walls v. Wells Fargo Bank, N.A.*, 276 F.3d 502, 507 (9th Cir. 2002). However, any award of attorneys' fees must be reasonable. *See, e.g., In re Dawson*, 390 F.3d at 1152; *In re Dyer*, 322 F.3d at 1195.

At the Hearing, counsel for the Estate and for Mr. Emmert, Mr. Jehnke and SPBC both conceded that the hourly rates charged by Mr. Taggart's counsel were reasonable, and no issue has been raised as to the reasonableness of Mr. Taggart's counsel's expense reimbursement requests. Accordingly, any disputes among the parties focus on the reasonableness of the time expended by Mr. Taggart's counsel, as reflected in the itemizations attached to the Declarations of Mr. Berman and Mr. Petticord.

I have reviewed both itemizations in light of the Fee Objection filed by counsel for Mr. Emmert, Mr. Jehnke and SPBC and the Response filed by Mr. Taggart's counsel. At the outset, I note that this matter has been protracted and professionally handled. My findings and conclusions as to each of the categories of objections to Mr. Taggart's attorneys' fees claim raised in the Fee Objection follow:

1. *Vagueness, Block Billing, Lumping.* While Mr. Berman sometimes includes several tasks in his individual time itemizations and describes tasks performed in general terms, I do not find that his time entries were too vague to allow for reasonableness review, and I find that his time entries appear reasonable for the work performed, even where tasks are grouped together within a single time entry. I do not find it appropriate to reduce his fees with respect to this objection.

2. *Administrative/Secretarial Functions.* Ordinarily, in a typical law firm setting, attorneys should not be billing their time for performing secretarial or administrative services. So, in typical circumstances, an objection on this basis would be well taken. However, as Mr. Berman points out in his Response, he is a solo practitioner, who does not employ a secretary or paralegal to assist him in performing his legal work. In reviewing his itemization, I do not find that the time expended on what might ordinarily be characterized as secretarial or administrative services unreasonable or excessive, particularly since any such time that I noted usually was combined with performing legal work. Again, I do not find it appropriate to reduce his fees on this basis.

3. *Billing in Quarter Hour Minimums.* As counsel for Mr. Emmert, Mr. Jehnke and SPBC notes, Mr. Berman bills in quarter hour minimum increments, but the total of quarter hour entries is only $1,575, and many of such entries that I reviewed reasonably would have required at least one quarter hour or more to perform the services described. I find no basis to reduce Mr. Berman's allowed fees on this ground.

4. *Representation of Mr. Taggart in the State Court Litigation.* Mr. Berman includes in his itemization, 2.25 hours with respect to representing Mr. Taggart in the state court litigation. In light of the District Court's determination that Mr. Taggart did not reengage in the state court litigation, I find that the objection on this point is well taken and will reduce the fee award by 2.25 hours ($787.50).

5. *Duplicative Time.* Counsel for Mr. Emmert, Mr. Jehnke and SPBC objects to Mr. Petticord's time entries

as vague and duplicative of services performed by Mr. Berman. I note that it is not unreasonable for a solo practitioner to seek counsel and assistance in developing legal strategies and performing legal work, particularly with respect to a matter that presented the complications of this one. Mr. Petticord's conferences with Mr. Berman and substantive legal work total only 6.0 hours, and I do not find that time unreasonable. However, Mr. Petticord also bills 10.25 hours for attending the depositions of Mr. Brown, Mr. Emmert and Mr. Jehnke, and for attending two hearings, without any detail as to services he was performing through just "being there." It is reasonable to assume that Mr. Petticord was helping Mr. Berman through his attendance by observing what went on outside the storm center of acting, but gauging the reasonableness of such passive attendance is difficult. Ultimately, I conclude that it is appropriate to deduct half the time Mr. Petticord spent merely attending depositions and court hearings or 5.125 hours ($1,025).

6. *Miscellaneous Substantive Time.* Counsel for Mr. Emmert, Mr. Jehnke and SPBC also objects to the 2.0 hours that Mr. Berman itemizes for preparation for examination/cross-examination of Mr. Emmert and Mr. Jehnke for the Hearing when neither Mr. Taggart nor any of the Respondents designated either Mr. Emmert or Mr. Jehnke as a witness for the Hearing. Excerpts from the deposition testimony of both Mr. Emmert and Mr. Jehnke were admitted as exhibits (Exhibits 29 and 30) without objection at the Hearing. Under the circumstances, I find that the subject time was not necessarily spent for Hearing preparation, and I will sustain the ob-

jection. In addition, in light of what was required after remand from the District Court in this matter and what was discussed at the scheduling conference with the court on September 16, 2014, I do not find that the 5.0 hours Mr. Berman spent on the Motion to Clarify and supporting memorandum and the related hearing, itemized for 9/23/2014, 9/24/2014 and 10/1/2014, was either necessary or reasonable. Accordingly, I will deduct those 5.0 hours as well. On the other hand, appreciate that Mr. Berman did not bill any time for preparation of his thorough Response to the Fee Objection in order to avoid another potential round of objections and responses to the additional fees requested, but I expect that he put in reasonable time to prepare the Response of at least 3.0 hours, and I will allow that additional time at his $350 hourly rate. Accordingly, I will deduct a net 4.0 hours ($1,400) for this miscellaneous substantive time category.

7. *Ninth Circuit Appeal.* Since Mr. Brown was not employed by the other Respondents to pursue the Ninth Circuit appeal after the District Court ruling and did not participate in the Ninth Circuit appeal, I conclude that it would not be appropriate to award fees in relation to the Ninth Circuit appeal (38.5 Hours = $13,475) against the Estate that I will award against the other Respondents.

8. *Totals of Attorneys' Fees and Costs Awarded.* Based on the foregoing findings and conclusions, I will award attorneys' fees of $101,450 and costs of $4,143.71, a total of $105,593.71, jointly and severally against Mr. Emmert, Mr. Jehnke and SPBC, and I will award attorneys' fees and costs totaling $92,118.71 against the Estate, payable jointly and severally as part of the total attorneys' fees and costs award against the Respondents.

C. *Punitive Damages.* As I stated at the Hearing, under current Ninth Circuit authority, I can award mildly coercive punitive damages in the context of a contempt proceeding for violation of the discharge injunction under § 105(a). *See, e.g., Espinosa v. United Student Aid Funds*, 553 F.3d 1193, 1205 n.7 (9th Cir. 2008) ("If the bankruptcy court finds that the creditor here willfully violated the injunction, it shall, at the very least, impose sanctions to the extent necessary to make [debtor] whole. *See* 2 Collier Bankruptcy Manual (3d rev. ed.) ¶ 524.02[2][c] ('In cases in which the discharge injunction was violated willfully, courts have awarded debtors actual damages, punitive damages and attorney's fees.')."); *In re Dyer*, 322 F.3d at 1193 ("Although 'relatively mild' non-compensatory fines may be necessary under some circumstances, *Zambrano v. Tustin*, 885 F.2d 1473, 1479 (9th Cir. 1989); [*F.J. Hanshaw Enters., Inc. v. Emerald River Dev., Inc.*], 244 F.3d at 1140 n.10, the language of § 105(a) simply does not allow for the serious punitive penalties here assessed (a minimum of $50,000 and, under the trustee's theory, over $200,000).").

In the Contempt Motion, Mr. Taggart requested punitive damages of $100,000. In his Hearing memorandum, Mr. Taggart reduced that request to $20,000.

I note first that since Mr. Brown is deceased, coercive sanctions serve no purpose with respect to the Estate, and accordingly, I decline to award punitive damages against the Estate. As to Mr. Emmert, Mr. Jehnke and SPBC, if all we were concerned with here was their actions while Mr. Brown represented them, I find that they acted consistent with the advice of their counsel, and punitive damages might not be appropriate. However, after

the District Court decision and subsequent rulings of this court and the Oregon state courts that the supplemental state court judgment for attorneys' fees against Mr. Taggart was improper, it ultimately required an order of this court, entered on March 4, 2015 (Docket No. 179), to get the supplemental attorneys' fees judgment vacated. In these circumstances, I find an award of $2,000 punitive damages (40% of the actual damages award) against Mr. Emmert, Mr. Jehnke and SPBC is appropriate as a sanction to insure that Mr. Taggart's discharge order is observed in future.

Conclusion

Based on the foregoing findings and conclusions, I award Mr. Taggart actual damages of $5,000, jointly and severally against the Respondents; attorneys' fees and costs of $105,593.71, awarded jointly and severally against Mr. Emmert, Mr. Jehnke and SPBC, of which $92,118.71 further is awarded jointly and severally against the Estate; and punitive damages of $2,000, awarded jointly and severally against Mr. Emmert, Mr. Jehnke and SPBC. No punitive damages are awarded against the Estate. Mr. Berman should prepare and submit an order and judgment consistent with this Memorandum Opinion, approved as to form by counsel for the Respondents, within ten days following entry of this Memorandum Opinion.

No. 18-489

IN THE SUPREME COURT OF THE UNITED STATES

BRADLEY WESTON TAGGART, PETITIONER

v.

SHELLEY A. LORENZEN, ET AL.

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served with copies of the **BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING NEITHER PARTY**, via email and first-class mail, postage prepaid, this 26th day of February, 2019.

[See Attached Service List]

As required by Supreme Court Rule 33.1(h), I certify that the document contains **8310** words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d). I declare under penalty of perjury that the foregoing is true and correct.
Executed on **February 26, 2019**.

Noel J. Francisco
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

February 26, 2019

Due to the continuing delay in receiving incoming mail at the Department of Justice, in addition to mailing your brief via first-class mail, we would appreciate a fax or email copy of your brief. If that is acceptable to you, please fax your brief to Charlene Goodwin, Supervisor, Case Management Specialist, Office of the Solicitor General, at (202) 514-8844, or email at SupremeCtBriefs@USDOJ.gov. Ms. Goodwin's phone number is (202) 514-2217 or 2218. Thank you for your consideration of this request.

18-0489
TAGGART, BRANDLEY WESTON
SHELL A. LORENZEN, EXEC. OF THE ESTATE OF
STUART BROWN, ET AL.

JOHN M. BERMAN
7175 SW BEVELAND ST.
STE 210
TIGARD , OR 97223

DANIEL L. GEYSER
GEYSER P.C.
ONE ENERGY SQUARE
4925 GREENVILLE AVE.,
STE. 200
DALLAS, TX 75206
214-800-2660
DANIEL.GEYSER@GEYSERPC.COM

MICHAEL B. KIMBERLY
MAYER BROWN LLP
1999 K STREET, NW
WASHINGTON, DC 20006
202-263-3000
MKIMBERLY@MAYERBROWN.COM

DAVID R. KUNEY
9200 CAMBRIDGE MANOR COURT
POTOMAC, MD 20854
301-299-9544
DAVIDKUNEY@DKUNEY.COM

HOLLIS K. MCMILAN
HOLLIS K. MCMILAN, P.C.
4504 SW CORBETT AVENUE
SUITE 210B
PORTLAND , OR 97239

NICOLE A. SAHARSKY
MAYER BROWN LLP
1999 K STREET NW
WASHINGTON, DC 20006
202-263-3052
NSAHARSKY@MAYERBROWN.COM

JANET M. SCHROER
HART WAGNER, LLP
1000 SW BROADWAY
SUITE 2000
PORTLAND , OR 97205

JAME RAY STREINZ
STREINZ LAW OFFICE LLC
7830 SW 40TH AVENUE
SUITE 1
PORTLAND , OR 97219

TARA TWOMEY
NATIONAL CONSUMER BANKRUPTCY
RIGHTS CENTER
1501 THE ALAMEDA
SUITE 200
SAN JOSE, CA 95126
831-229-0256
TTWOMEY@ME.COM

No. 18-489

In the Supreme Court of the United States

BRADLEY WESTON TAGGART,

Petitioner,

v.

SHELLEY A. LORENZEN, *as executor of the estate of Stuart Brown*; TERRY W. EMMERT; KEITH JEHNKE; *and* SHERWOOD PARK BUSINESS CENTER, LLC,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

JANET M. SCHROER
Hart Wagner, LLP
1000 SW Broadway
Suite 2000
Portland, Oregon 97205

JAMES RAY STREINZ
Streinz Law Office LLC
7830 SW 40th Avenue
Suite 1
Portland, Oregon 97219

Counsel for Shelley A. Lorenzen

MICHAEL B. KIMBERLY
Counsel of Record
PAUL W. HUGHES
Mayer Brown LLP
1999 K Street NW
Washington, DC 20006
(202) 263-3000

Counsel for All Respondents

HOLLIS K. MCMILAN
Hollis K. McMilan, P.C.
4504 SW Corbett Avenue
Suite 210B
Portland, OR 97239

Counsel for Terry W. Emmert; Keith Jehnke; and Sherwood Park Business Center, LLC

CORPORATE DISCLOSURE STATEMENT

Sherwood Park Business Center, LLC has no parent corporation, and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

Corporate Disclosure Statement i
Table of Authorities ii
Introduction 1
Statement 3
A. Statutory background 3
B. Factual background 5
C. Procedural background 8
Reasons for Denying the Petition 13
A. There is no conflict among the circuits warranting the Court's attention 14
B. The question presented is unimportant 19
C. This case is a poor vehicle for reaching the question presented 23
D. Petitioner's attempt to conflate a violation of the automatic stay with a violation of the discharge injunction is unpersuasive 25
Conclusion 30
Appendix A (August 6, 2012 decision of the district court reversing the bankruptcy court) 1a
Appendix B (January 23, 2012 decision of the bankruptcy court denying sanctions) 12a

TABLE OF AUTHORITIES

Cases

In re Barr,
457 B.R. 733 (Bankr. N.D. Ill. 2011) 22

In re Ben Franklin Hotel Assocs.,
186 F.3d 301 (3d Cir. 1999) 18, 21, 22

In re Bennett,
298 F.3d 1059 (9th Cir. 2002) 16

In re Cano,
410 B.R. 506 (Bankr. S.D. Tex. 2009) 3

In re Castellino Villas,
836 F.3d 1028 (9th Cir. 2016) 24

Chambers v. *NASCO, Inc.*,
501 U.S. 32 (1991) 5, 25

In re Culley,
347 B.R. 115 (B.A.P. 10th Cir. 2006) 19

Descamps v. *United States*,
570 U.S. 254 (2013) 28

In re Dyer,
322 F.3d 1178 (9th Cir. 2003) 16, 25

Electrical Workers Pension Tr. Fund v.
Gary's Elec. Serv. Co.,
340 F.3d 373 (6th Cir. 2003) 4, 20

In re Everly,
346 B.R. 791 (B.A.P. 8th Cir. 2006) 22

Field v. *Mans*,
516 U.S. 59 (1995) 28

In re Fierke,
567 B.R. 322 (Bankr. W.D. Mich. 2017) 4, 20

Cases—continued

In re Fina,
550 F. App'x 150 (4th Cir. 2014) 19

In re Hardej,
563 B.R. 855 (Bankr. N.D. Ill. 2017) 4, 21, 22

In re Hardy,
97 F.3d 1384 (11th Cir. 1996) ..... *passim*

Holland v. *Florida*,
560 U.S. 631 (2010) 20

Howard Johnson Co. v. *Khimani*,
892 F.2d 1512 (11th Cir. 1990) 14, 15

IRS v. *Murphy*,
892 F.3d 29 (1st Cir. 2018) 5, 18, 21

Jove Eng'g, Inc. v. *IRS*,
92 F.3d 1539 (11th Cir. 1996) 26

In re Kewanee Boiler Corp.,
297 B.R. 720 (Bankr. N.D. Ill. 2003) 22

Kolstad v. *American Dental Ass'n*,
527 U.S. 526 (1999) 28

In re Kuhl,
2005 WL 8146346 (E.D.N.Y. 2005), ... 22

In re Martin,
474 B.R. 789 (B.A.P. 6th Cir. 2012) 19

McComb v. *Jacksonville Paper Co.*,
336 U.S. 187 (1949) 26

In re McGhan,
288 F.3d 1172 (9th Cir. 2012) 8

In re Moore,
2017 WL 934641 (Bankr. N.D. Okla. 2017) 22

Cases—continued

In re Porter,
25 B.R. 425 (Bankr. D. Vt. 1982) 4, 21

In re Pratt,
462 F.3d 14 (1st Cir. 2006) 17

In re Renfrow,
2017 WL 6541136 (Bankr. N.D. Okla.) 20

In re Rental Sys., LLC,
511 B.R. 882 (Bankr. N.D. Ill. 2014) 21

In re Revere Copper & Brass, Inc.,
29 B.R. 584 (Bankr. S.D.N.Y. 1983) 4, 21

Roadway Express, Inc. v. *Piper*,
447 U.S. 752 (1980) 25

Romanucci & Blandin, LLC v. *Lempesis*,
2017 WL 4401643 (N.D. Ill. 2017) 22

Russello v. *United States*,
464 U.S. 16 (1983) 27

In re Sekendur,
334 B.R. 609 (Bankr. N.D. Ill. 2005) 4, 5

In re Slater,
573 B.R. 247 (Bankr. D. Utah 2017) 20

Taggart v. *Brown*,
575 F. App'x 719 (9th Cir. 2014) 9

In re Wilson,
527 B.R. 635 (Bankr. N.D. Cal. 2015) 22

In re Witt,
2018 WL 3966692 (Bankr. N.D. Ohio 2018) 20

In re Ybarra,
424 F.3d 1018 (9th Cir. 2005) 1, 8

Cases—continued

In re Zilog, Inc.,
450 F.3d 996 (9th Cir. 2006) 9, 12, 25

Statutes

11 U.S.C. 105(a) ..... *passim*

11 U.S.C. 362(a) 3, 26

11 U.S.C. 362(k) 13

11 U.S.C. 362(k)(1) 3, 26

11 U.S.C. 524 27

11 U.S.C. 524(a)(2) ..... *passim*

26 U.S.C. 7433(e) 18

26 U.S.C. 7433(e)(1) 4, 15

Pub L. 105-206, 112 Stat. 685 (1998) 15

Other Authorities

W. E. Shipley, *Recovery for Mental Shock or Distress in Connection with Injury to or Interference with Tangible Property*, 28 A.L.R. 2d 1070 (1953, with supplements) 28

Joel E. Smith, *Recovery by Debtor, Under Tort of Intentional or Reckless Infliction of Emotional Distress, for Damages Resulting from Debt Collection Methods*, 87 A.L.R. 3d 201 (1978, with supplements) 28

Black's Law Dictionary (10th ed. 2014) 16

INTRODUCTION

Respondents sued petitioner in state court for breach of contract in connection with petitioner's purported sale of an interest in a mutually-owned LLC. On the eve of trial, petitioner filed for bankruptcy, and the action was stayed. When the bankruptcy proceedings concluded, the stay was lifted. Because respondents' claim for damages was discharged in the bankruptcy, respondents proceeded on their request for injunctive relief only—and they prevailed.

The agreement that petitioner had breached (the operating agreement of the LLC) included a fee-shifting provision. Thus, respondents asked the state court for a determination of whether their entitlement to attorneys' fees had been discharged in the bankruptcy. Relying on *In re Ybarra*, 424 F.3d 1018 (9th Cir. 2005), they contended that petitioner's liability for post-petition attorneys' fees had *not* been discharged because petitioner had "returned to the fray" of the litigation post-petition. The state court agreed.

Petitioner reopened his bankruptcy proceedings, arguing that the bankruptcy court should impose sanctions on respondents for seeking to collect on a discharged liability. But the bankruptcy court agreed with the state court that respondents were not barred from pursuing post-petition fees. Respondents accordingly filed a supplemental judgment for attorneys' fees in the state court proceedings.

Over the complex course of subsequent litigation, the state court's and bankruptcy court's rulings were overturned, and petitioner renewed his request for sanctions against respondents. Although the bankruptcy court imposed sanctions on remand, the Bankruptcy Appellate Panel reversed. It concluded that respondents had not violated the discharge injunction

at all and "should be praised, not sanctioned, for having followed [the] correct procedure to resolve the [discharge] issue." Pet. App. 47a. The BAP held separately that, even if the discharge injunction had been violated, the bankruptcy court applied the wrong legal standard for determining respondents' liability for contempt.

The Ninth Circuit affirmed. Without reaching the question of whether respondents had violated the discharge injunction, it held that respondents could not be liable for sanctions because they had had a good faith belief that petitioner's obligation to pay attorneys' fees was not discharged.

That holding does not warrant further review.

For starters, petitioner significantly overstates any disagreement in the lower courts on the question presented. Most notably, *In re Hardy*, 97 F.3d 1384 (11th Cir. 1996), is distinguishable on its facts and has been abrogated by the Internal Revenue Service Restructuring and Reform Act of 1998. Beyond that, the question presented in the petition arises infrequently. And because a court's decision to impose contempt sanctions is doubly discretionary (at both the liability and damages stages), context-dependent outcomes are expected. Because the BAP held that respondents did not violate the discharge injunction under the unique facts of this case, moreover, this would be a poor vehicle for reaching the issue in any event.

Finally, the Ninth Circuit's approach to the question presented is plainly correct. Indeed, the position advocated by petitioner would write language into the Bankruptcy Code that does not appear there.

For those reasons and those laid out below, the petition should be denied.

STATEMENT

A. Statutory background

1. A bankruptcy proceeding generally concludes with a discharge order. So far as relevant here, a discharge order "operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any [discharged] debt as a personal liability of the debtor." 11 U.S.C. 524(a)(2).

Section 524(a)(2) does not specify automatic monetary damages for violations of a discharge injunction. Rather, a discharge order must be enforced, if at all, under "the inherent contempt power of the court" or the court's "statutory contempt powers under [Section] 105." *In re Hardy*, 97 F.3d 1384, 1389 (11th Cir. 1996). Accord, *e.g.*, *In re Cano*, 410 B.R. 506, 538-539 (Bankr. S.D. Tex. 2009) ("Bankruptcy Courts have both inherent contempt authority and equitable authority under [Section] 105."). Section 105, in turn, provides that "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. 105(a).

Neither Section 524(a)(2) nor Section 105(a) uses the word "willful." This omission stands in contrast with other provisions of the Bankruptcy Code. For example, Bankruptcy Code Section 362(a) automatically stays creditors' collection efforts upon a debtor's filing of a bankruptcy petition. To enforce the automatic stay, Section 362(k) provides that "an individual injured by any *willful* violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages." 11 U.S.C. 362(k)(1) (emphasis added).

A similar standard applies to the United States' efforts to collect unpaid tax obligations under Section 7433(e). That Code section provides that "[i]f, in connection with any collection of Federal tax with respect to a taxpayer, any officer or employee of the Internal Revenue Service *willfully* violates any provision of section 362 (relating to automatic stay) or 524 (relating to effect of discharge) of title 11 * * *, such taxpayer may petition the bankruptcy court to recover damages against the United States." 26 U.S.C. 7433(e)(1) (emphasis added).

2. Contempt orders are equitable and discretionary, regardless whether they are issued pursuant to the court's inherent authority or Section 105(a). *E.g.*, *In re Fierke*, 567 B.R. 322, 325 n.4 (Bankr. W.D. Mich. 2017) ("[A] decision on a contempt petition is within the sound discretion of the trial court.") (citing *Electrical Workers Pension Tr. Fund* v. *Gary's Elec. Serv. Co.*, 340 F.3d 373, 378 (6th Cir. 2003)). Thus, even when a Section 524(a)(2) discharge injunction is violated, "[i]t is within the sound discretion of the court to refuse to hold persons in contempt." *In re Revere Copper & Brass, Inc.*, 29 B.R. 584, 588-589 (Bankr. S.D.N.Y. 1983) (citing *In re Porter*, 25 B.R. 425, 428 (Bankr. D. Vt. 1982)). That is consistent with Section 105(a)'s plain language, which permits a court to enter only those orders that are "necessary or appropriate" to effectuate the Code.

It is also within the court's discretion, once an individual has been held in contempt, to determine an appropriate sanction, if any. See *In re Hardej*, 563 B.R. 855, 866-867 (Bankr. N.D. Ill. 2017) ("In their discretion, however, courts have also declined to award damages for discharge injunction violations when such an award would be inappropriate under the circumstances.") (collecting cases). See also *In re*

Sekendur, 334 B.R. 609, 622 (Bankr. N.D. Ill. 2005) (citing *Chambers* v. *NASCO, Inc.*, 501 U.S. 32, 45 (1991)) (recognizing generally a court's "discretion to determine the degree of punishment for contempt"). Thus, even in circumstances where good faith is not "a defense to liability" for contempt, it is typically possible for a contemnor "to raise its good faith belief * * * as a means of mitigating damages." *IRS* v. *Murphy*, 892 F.3d 29, 39 (1st Cir. 2018).

B. Factual background

Respondent Sherwood Park Business Center (SPBC), is a limited liability company that owns a mixed-use business park in Sherwood, Oregon. At all times relevant, SPBC's members included petitioner Bradley Taggart and respondents Terry Emmert and Keith Jehnke. CA9 ER 633.

Petitioner, who had principal responsibility for managing the LLC, was facing financial difficulty. CA9 ER 633. Thus, at least one company that he owned or managed stopped remitting payroll taxes to the IRS and Oregon Department of Revenue. *Ibid.* Shortly thereafter, petitioner "disappeared." *Ibid.*

Emmert and Jehnke removed petitioner as manager of SPBC, and Jehnke was elected manager in his place. See CA9 ER 634. Jehnke discovered that in late 2004, petitioner had wrongfully appropriated more than $30,000 of SPBC's funds for his own use. *Ibid.* SPBC initiated an arbitration proceeding, in which petitioner was deemed liable for converting the funds and breaching his fiduciary duty to SPBC. *Ibid.*

To raise much-needed capital (and to pay the judgment owed to SPBC, among other things), petitioner resolved to sell his interest in SPBC. Petitioner's attorney, John Berman, advised petitioner to transfer his interest in SPBC to a new LLC owned solely by

petitioner. CA9 ER 634. The plan initially was for petitioner to sell his interest in the new LLC to a third party. CA9 ER 635. Petitioner, however, was unable to find a conventional buyer. *Ibid.* He instead sold his interest to Berman. *Ibid.* Petitioner used a portion of the proceeds to pay the $30,000-plus judgment to SPBC; he used the remainder for personal purposes, but not to pay the outstanding payroll taxes that he owed. See CA9 ER 635-636.

Petitioner's sale of his interest in SPBC to Berman violated the SPBC operating agreement, which prohibited sales or transfers of a membership interest to a third party without the consent of the other members. CA9 ER 582-584. When Emmert and Jehnke learned of the purported sale to Berman, SPBC sued petitioner, petitioner's LLC, and Berman in Washington County Circuit Court. See Pet. App. 5a. In addition to damages, SPBC sought an equitable order unwinding the transfer and expelling petitioner from SPBC. CA9 ER 595-596, 599.[1]

On the eve of trial, petitioner filed a petition for bankruptcy protection under Chapter 7 of the Bankruptcy Code. Pet. App. 5a. The state court case was stayed pending resolution of the bankruptcy case. *Ibid.* Petitioner listed a "[p]otential attorney fee award" in the state case as a contingent asset in the bankruptcy. CA9 ER 768. The bankruptcy trustee did not pursue the claim on behalf of the estate.

---

[1] The transfer of petitioner's interest in SPBC to Berman was especially alarming because Emmert and Berman had a long and acrimonious personal history. Most notably, Berman had represented several of Emmert's adversaries in a string of business disputes. Around the same time as the arbitration, Berman also represented one of Emmert's former employees in an employment dispute against Emmert.

At the conclusion of the bankruptcy proceedings some time later, the state court litigation resumed. Pet. App. 5a. Emmert and Jehnke sought to reopen discovery, and Berman (representing petitioner) vigorously opposed those efforts. *Ibid.*

The day before the rescheduled trial, Berman filed a motion to dismiss the state court equitable claims in light of the bankruptcy discharge. CA9 ER 610-611. The court denied the motion, holding that petitioner was a necessary party to the equitable claims. Pet. App. 6a. But the parties agreed that no monetary damages would be awarded against petitioner. *Ibid.*

Emmert, Jehnke, and SPBC prevailed in the state court litigation. The court unwound the transfer of petitioner's interest in SPBC to Berman, expelled petitioner from the LLC, and allowed Emmert and Jehnke to purchase petitioner's membership interest at a price to be determined by an appraisal. Pet. App. 6a; CA9 ER 639. Emmert and Jehnke submitted a proposed judgment, to which petitioner objected. See Pet. App. 6a. The state court entered the judgment. *Ibid.*

Emmert, Jehnke, and SPBC—through Emmert's and Jehnke's attorney Stuart Brown[2]—subsequently filed a motion for attorneys' fees (Pet. App. 6a) pursuant to the operating agreement's fee-shifting provision (CA9 ER 586). The fee motion sought only those fees incurred after the filing of petitioner's bankruptcy petition. Pet. App. 6a. The motion thus acknowledged petitioner's bankruptcy but argued that post-petition attorneys' fees were not discharged because petitioner had actively engaged in post-petition litigation. Under

---

[2] Brown passed away during the pendency of this litigation. His surviving spouse, Shelley Lorenzen, is a respondent here, in her capacity as executor of Brown's estate.

the Ninth Circuit's decision in *In re Ybarra*, 424 F.3d 1018 (9th Cir. 2005), respondents argued that petitioner had "returned to the fray" and that the bankruptcy discharge thus did not apply. Pet. App. 7a.

The state court held an evidentiary hearing and ultimately agreed that respondents' post-petition fees were not discharged because, under *Ybarra*, petitioner had returned to the fray. Pet. App. 7a. The court therefore granted respondents' fee request in part. *Ibid.*[3]

C. Procedural background

1. Before the state court ruled on the discharge question, petitioner reopened his bankruptcy proceedings and moved for sanctions against respondents for violating the statutory discharge injunction. Pet. App. 7a; CA9 ER 770-782.

The bankruptcy court denied the motion. BIO App. 12a-35a.[4] After reciting the facts and describing *Ybarra*'s holding, the court concluded that "a state court is not divested of jurisdiction 'to determine the applicability of a discharge order when discharge in bankruptcy is raised as a defense to a state cause of action filed in a state court.'" BIO App. 29a (quoting *In re McGhan*, 288 F.3d 1172, 1180 (9th Cir. 2012)). "Accordingly," the bankruptcy court explained, "a state court, such as the Circuit Court in this case, has concurrent jurisdiction with this court to interpret the bankruptcy court's discharge orders." *Ibid.*

---

[3] The state court denied fees to Emmert and Jehnke personally on grounds not relevant here. See Pet. App. 7a.

[4] The petition appendix omits the initial opinion of the bankruptcy court denying sanctions and of the district court reversing that decision. The missing opinions are reproduced in an appendix to this brief.

After concluding that the state court's decision concerning the applicability of the discharge injunction did not preclude the bankruptcy court from addressing the same issue anew, the bankruptcy court upheld the state court's ruling. BIO App. 30a-35a. Indeed, it concluded that the state court's decision concerning the scope of the bankruptcy discharge should be upheld regardless whether it was reviewed de novo or for clear error. *Ibid.*

2. Petitioner appealed to the U.S. District Court for the District of Oregon, which reversed. BIO App. 1a-11a. Notwithstanding petitioner's failure to dismiss his counterclaim for attorneys' fees and his repeated objections to discovery rulings, dispositive issues, and fees, the district court concluded that petitioner's "actions were not sufficiently affirmative and voluntary to be considered returning to the fray." BIO App. 11a. The court thus remanded to the bankruptcy court "for consideration of whether [petitioner] has proven whether [respondents] knowingly violated the discharge injunction in seeking attorney fees." *Ibid.*[5]

3. On remand, the bankruptcy court found respondents liable for contempt (Pet. App. 52a-64a) and assessed damages (Pet App. 65a-75a).

Relying on *In re Zilog, Inc.*, 450 F.3d 996, (9th Cir. 2006), the court explained that a violation of a discharge injunction is sanctionable when "the alleged contemnor knew that the discharge injunction applied" and "the alleged contemnor intended the actions that violated the discharge injunction." Pet App.

---

[5] Respondents SPBC, Emmert, and Jehnke appealed the district court's order to the Ninth Circuit, which dismissed for lack of jurisdiction under Section 158(d). *Taggart* v. *Brown*, 575 F. App'x 719 (9th Cir. 2014).

58a. The court rejected the notion that "a good faith belief that the discharge injunction does not apply to proceedings vitiates the Respondents' knowledge that the discharge injunction was in existence." *Ibid.* Under the bankruptcy court's understanding of the law, the inquiry "does not allow for the subjective belief, good faith or otherwise, regarding whether, as a legal matter, the discharge applied." Pet. App. 59a.

Taking the view that the standard is "strict liability," the bankruptcy court concluded that it was "[not] helpful" to respondents that both the state court and the bankruptcy court had held that the discharge injunction did not apply, because those decisions were "reversed on appeal." Pet. App. 60a-61a. Because "[r]espondents had actual knowledge that [petitioner's] bankruptcy discharge had been entered," and because they "intended" to "pursu[e] proceedings to obtain" an award of attorneys' fees, the bankruptcy court held respondents liable for contempt. Pet. App. 61a-63a. It subsequently assessed more than $105,000 in attorneys' fees and costs, plus $2,000 in punitive damages, as a sanction. Pet. App. 65a-75a.

4. The Bankruptcy Appellate Panel unanimously reversed. Pet. App. 21a-51a. As an initial matter, the BAP explained that "Section 524(a)(2) clearly was not designed to prohibit actions that seek" a determination of whether the debtor returned to the fray under *Ybarra*. Pet. App. 46a. Indeed,

> [d]ue to the *Ybarra* rule, the scope of the discharge order here was ambiguous with respect to the post-discharge attorneys' fees and costs. Whether a debtor voluntarily returns to the fray under the *Ybarra* rule is a factual question subject to dispute as demonstrated by the state and bankruptcy courts' ruling on the one hand, and the district court's ruling the other

> hand. A creditor seeking to invoke the *Ybarra* rule would necessarily need to seek such a determination from a court.

Ibid. Although the BAP acknowledged that it had "previously said that a party seeking a bankruptcy court determination regarding the scope of the discharge should file an adversary complaint seeking declaratory relief" in the bankruptcy court, it held that respondents' "request for a[n] *Ybarra* ruling in the state court was essentially the same." *Ibid.* The BAP thus held that "following this procedure [does not] equate[] to a violation of [Section] 524(a)(2)" at all. *Ibid.* Rejecting petitioner's contrary position, the BAP concluded that respondents "should be praised, not sanctioned, for having followed a correct procedure to resolve the *Ybarra* issue." Pet. App. 47a.

Were it otherwise, the BAP explained, no creditor would ever be willing to "fil[e] an adversary proceeding to seek a court's ruling on the issue" of the scope of a discharge, for fear of contempt sanctions if the debt were held discharged. Pet. App. 46a-47a.

What is more, "once the state court decided that the discharge did not bar [respondents'] claim for attorneys' fees, [they] were entitled to rely on that decision." Pet. App. 47a. After all, "[a] party who acts in reliance on a facially valid determination that the discharge does not apply cannot be guilty of 'willfully' violating the discharge injunction." *Ibid.*

The BAP alternatively held that the test for willfulness applied by the bankruptcy court was erroneous. Pet. App. 48a. "Rather than conducting any inquiry into whether [respondents] were aware that the discharge injunction applied to their fee request as instructed in *Zilog*," the BAP explained, "the [bankruptcy] court imputed such awareness by strict

liability." *Ibid.* "[T]he bankruptcy court erred when it relied on the *Hardy* test rather than using the Ninth Circuit's test" on this point. *Ibid.* In light of the state court's and bankruptcy court's rulings in respondents' favor, the BAP concluded, respondents "held an objectively reasonable belief that, for reasons specific to [petitioner's] conduct in the state court, the discharge injunction did not apply to their post-discharge attorneys' fee request under the *Ybarra* rule." Pet. App. 48a-49a. "Due to the application of an improper legal standard, the bankruptcy court's factual findings regarding [respondents'] actual knowledge are clearly erroneous" and were grounds for reversal. Pet. App. 50a.

5. The Ninth Circuit unanimously affirmed the BAP. Pet. App. 1a-15a. The court of appeals began by explaining that "the creditor's good faith belief that the discharge injunction does not apply to the creditor's claim precludes a finding of contempt, even if the creditor's belief is unreasonable." Pet. App. 12a (citing *Zilog*, 450 F.3d at 1009 n.14). "In this case," the court continued, "the bankruptcy court abused its discretion by concluding that [respondents] knowingly violated the discharge injunction" because it "appl[ied] an incorrect rule of law." *Ibid.* In particular, "[t]he bankruptcy court held that a good faith belief that the discharge injunction was inapplicable to the [respondents'] claims was irrelevant." *Ibid.* Holding that the BAP correctly reversed that holding, the Ninth Circuit affirmed.

Having affirmed on that basis, the court "express-[ed] no opinion as to whether" respondents "violate[d] the discharge injunction." Pet App. 14a.

6. The Ninth Circuit denied rehearing en banc. Pet. App. 16a-20a.

REASONS FOR DENYING THE PETITION

The Ninth Circuit affirmed the BAP's denial of equitable sanctions in this case. Further review of that fact-bound decision is not warranted.

To begin with, petitioner significantly oversells the supposed disagreement among the lower courts concerning the state of mind necessary to impose contempt sanctions under Section 105(a) for a violation of Section 524(a)(2). Many of the cases he cites are not precedential, and others construe different Code provisions containing materially different statutory language. In other cases, including the Eleventh Circuit's 22-year-old decision in *Hardy*, the differences in outcomes are attributable not to conflicting legal approaches but to differences in the facts.

The question presented is also unimportant. It arises infrequently—and, when it does arise, it implicates questions of equitable discretion, as to which context-dependent outcomes are expected.

This case would be a poor vehicle for addressing the issue in any event. The BAP held that respondents did not violate petitioner's discharge injunction in the first place, making sanctions statutorily unavailable regardless of the standard applied.

Finally, the decision below is correct. Petitioner's view is that a court must impose sanctions any time a creditor "willfully" violates a discharge injunction. But that position conflates Section 524(a)(2), which concerns discharge injunctions, with Section 362(k), which concerns automatic stays. Whereas Section 362(k) mandates damages for any "willful" violation, Section 524(a)(2) does not. Rather, Section 105(a) permits entry of a contempt order for a violation of Section 524(a)(2) only when "necessary or approp-

riate" to effectuate the purposes of the Code. According to that standard, parties who seek and follow court guidance (like respondents in this case) are not subject to sanctions—as the BAP held in this case, consistent with the holdings of other courts.

A. There is no conflict among the circuits warranting the Court's attention

Petitioner asserts (Pet. 22) that the lower courts are in an "indisputable and entrenched" conflict over the question presented. That is wrong.

1.a. To support his claim of a conflict, petitioner relies principally on the Eleventh Circuit's dated holding in *Hardy*. See Pet. 11-13. But that case is readily distinguishable on its facts.

In *Hardy*, the IRS unilaterally concluded that the debtor's bankruptcy discharge did not apply to certain unpaid tax obligations. 97 F.3d at 1387. Unlike respondents in this case, the IRS did not first obtain a court order resolving the discharge question in its favor. Thus, it took action to collect the unpaid taxes unilaterally, without the imprimatur of a court order declaring that the taxes had not been discharged.

That makes a difference because the Eleventh Circuit has held—in a case cited favorably in *Hardy* itself—that "[c]onduct that evinces substantial, but not complete, compliance with the court order may be excused if it was made as part of a good faith effort at compliance." *Howard Johnson Co.* v. *Khimani*, 892 F.2d 1512, 1516 (11th Cir. 1990).

That is an exact description of this case. See Pet. App. 46a-47a. As petitioner acknowledges, creditors comply with a discharge injunction if they first obtain a court order declaring the discharge injunction inapplicable. See Pet. 30 (creditors comply with a discharge injunction when they "seek declaratory relief

before acting") (emphasis omitted). Respondents did just that: They sought and received not one, but two court orders resolving the question of the injunction's applicability in their favor. The fact that the orders were later reversed on appeal is beside the point; at the time they acted, respondents had substantially complied with their obligations under the Bankruptcy Code, as the BAP expressly held. Pet. App. 46a-47a.

Because the court in *Hardy* was not similarly confronted with a creditor who undertook "a good faith effort at compliance" (*Howard Johnson*, 892 F.2d at 1516), it is hard to see how *Hardy* could be in conflict with the outcome in this case.

Petitioner nonetheless seizes on language from *Hardy* suggesting that the focus in a contempt proceeding "is not on the subjective beliefs or intent of the alleged contemnors in complying with the order, but whether in fact their conduct complied with the order at issue." 97 F.3d at 1390. It is unclear whether *Hardy*'s statement on that score has any continuing vitality. That is because *Hardy* involved a motion for sanctions against the IRS, which today would be brought under Section 7433(e). See Internal Revenue Service Restructuring and Reform Act, Pub L. 105-206, § 3102, 112 Stat. 685, 730-731 (1998).

Section 7433(e) provides for damages against the government when the IRS "willfully violates" a taxpayer's discharge injunction. 26 U.S.C. 7433(e)(1). By contrast, the Code provisions at issue in *this* case lack the same "willful violation" language. It is therefore unlikely that *Hardy* has any continuing relevance.

b. Taking liberty with both description and attribution, petitioner points to stray remarks from the proceedings below, which he says acknowledge a conflict with *Hardy*. Not so.

Petitioner first asserts (at 10 & n.4, 13) that "[t]he decision below expressly acknowledged the 'tension' between its holding and *Hardy*." That is wrong. The court below adverted to apparent "tension" between *Zilog*, on the one hand, and *In re Dyer*, 322 F.3d 1178 (9th Cir. 2003), and *In re Bennett*, 298 F.3d 1059 (9th Cir. 2002), on the other hand. See Pet. App. 13a. In the course of its discussion, the lower court did drop a footnote (Pet. App. 13a n.5) to language from *Dyer* that quoted from *Hardy*. But the court went on to explain that the two lines of cases are consistent, not in conflict. Pet. App. 13a.

Petitioner also repeatedly asserts (Pet. 3, 10 n.4, 11, 13, 22) that the "the panel" and "the Ninth Circuit" conclusively "recognized" and "admitt[ed]" at the oral argument below that affirming the BAP "would 'ineluctably cause there to be a split between the Ninth Circuit and the Eleventh Circuit[].'" That is a striking misrepresentation. In fact, a single judge (Judge Bea—not "the panel," not "the Ninth Circuit") merely *asked* whether affirming the BAP would create a circuit conflict, and his question was premised on the misimpression that the Eleventh Circuit imposes "strict liability" for violations of discharge injunctions, which it does not.[6] A single judge asking a question predicated on a misunderstanding of out-of-circuit case law is not same thing as the "the Ninth Circuit" "admitt[ing]" to a circuit split.

---

[6] The BAP likewise thought the Eleventh Circuit's standard is strict liability. See Pet. App. 36a. But strict liability is "[l]iability that does not depend on proof of negligence or intent." *Liability*, Black's Law Dictionary (10th ed. 2014). The Eleventh Circuit's rule, by contrast, requires both knowledge and general intent. See *Hardy*, 97 F.3d at 1390.

2. Petitioner next says (Pet. 14-16) that the First Circuit's decision in *In re Pratt*, 462 F.3d 14 (1st Cir. 2006), conflicts with the decision below. That is a puzzling assertion.

Pratt involved a creditor's refusal to release, post-bankruptcy, a lien on the debtors' car. The debtors argued that the creditor had "violated the chapter 7 discharge injunction because its refusal either to repossess the vehicle or to release its lien effectively coerced them to repay the discharged personal liability on their car loan." *Pratt*, 462 F.3d at 16-17.

The First Circuit noted that "the core issue [was] whether the creditor acted in such a way as to 'coerce' or 'harass' the debtor improperly" into repaying the debt. *Pratt*, 462 F.3d at 19. Emphasizing that "each case must be assessed on its particular facts" (*id.* at 20), the court there held that the "the particular confluence of * * * circumstances" indicated that the creditor's "refusal to release its lien" was "objectively coercive." *Id.* at 19.

Petitioner asserts (Pet. 14) that, from there, the First Circuit "confront[ed] the question presented [in the petition]." It did nothing of the sort. The court merely flagged the issue of whether a debtor must prove a violation of Section 524(a)(2) "by a preponderance of the evidence" or instead "by clear and convincing evidence." *Pratt*, 462 F.3d at 20. The court declined to resolve the question because it found that the debtors had satisfied their burden either way. *Id.* at 21. Although the court—citing an automatic stay case governed by Section 362—noted in passing (*ibid.*) that the debtor had offered sufficient evidence to prove a "willful" violation of the discharge injunction, the court did not purport to adopt an extra-textual willful-

ness standard in contempt cases under Section 105(a). Indeed, it gave no thought to the issue at all.[7]

Petitioner's citation to *IRS* v. *Murphy*, 892 F.3d 29 (1st Cir. 2018), is equally bewildering. That case concerned Section 7433(e)—the provision that governs discharge violations against the IRS, including cases with facts like those in *Hardy*. The court was thus called upon to construe the words "'willfully violates' as used in [Section] 7433(e)." *Id.* at 34. And the court there held only that Section 7433(e)'s willfulness standard should be read consistently with Section 362(k)'s willfulness standard. *Id.* at 40-41. The question of what standard applies in cases like this one—proceeding under Section 105(a), which lacks the same language—was not presented in *Murphy*.

True, the First Circuit noted in passing that "in *In re Pratt*, we used the same standard to evaluate whether a violation of a discharge order was willful." *Murphy*, 892 F.3d at 40. But that superficial observation was not a "reaffirm[ation]" of any legal holding (Pet. 15); rather, it was an unthinking observation that the violation in *Pratt* was found to be willful. No more, no less.

There is no indication in either *Pratt* or *Murphy* that the First Circuit would hold that respondents had willfully violated petitioner's discharge injunction, or even that willfulness is the appropriate standard for alleged Section 524(a)(2) violations enforced under Section 105(a). There is accordingly no conflict with the First Circuit.

---

[7] It is thus ironic that petitioner dismisses *In re Ben Franklin Hotel Associates*, 186 F.3d 301 (3d Cir. 1999), on the ground that its "so-called 'holding' came in a single paragraph at the tail end of the court's opinion" and "did not include any supporting rational or citations." Pet. 21-22. The same is true of *Pratt*.

3. Apart from *Hardy*, *Pratt*, and *Murphy*, petitioner cites a handful of unpublished, non-binding cases, including *In re Fina*, 550 F. App'x 150 (4th Cir. 2014) (unpublished), *In re Martin*, 474 B.R. 789 (B.A.P. 6th Cir. 2012) (unpublished), *In re Culley*, 347 B.R. 115 (B.A.P. 10th Cir. 2006) (unpublished), and several bankruptcy court cases. See Pet. 17-21. Because none of those decisions is precedential, there is no reason to think that this case would have been resolved differently in the Fourth, Sixth, or Tenth Circuits.

Citing just two cases decided over the past 27 years, petitioner nevertheless asserts (Pet. 18 n.10) that this Court "routinely considers decisions of bankruptcy appellate panels in describing conflicts warranting the Court's review." But the two cases that petitioner cites each involved an independent split among the courts of appeals themselves, which is absent here. What is more, the Court in those cases cited *published* BAP decisions, which bind other BAP panels. *E.g.*, CA6 BAP Rule 8024-1(b); CA9 BAP Rule 8024-1(c). The BAP decisions that petitioner cites here, by contrast, are unpublished and therefore non-binding. There is accordingly no split worthy of this Court's attention.

B. The question presented is unimportant

Review is also unwarranted because the issue presented is unimportant, for two reasons.

First, the purported conflict is stale, and the issue arises infrequently. *Hardy* was decided more than 22 years ago, and *Zilog*—which the panel below applied without modification—was decided more than 12 years ago. In all that time, the issue over which those cases supposedly conflict has not arisen frequently, either before the bankruptcy courts or before Article III judges.

In fact, petitioner cites just 11 cases—far fewer than the "dozens" promised (Pet. 3, 19, 22)—that he says turned on the question presented. See Pet. 18-21. But several of the cited cases did not in fact "confront[] the identical question as the Ninth Circuit" in this case, as petitioner asserts. Pet. 19.

For example, *In re Witt*, 2018 WL 3966692 (Bankr. N.D. Ohio 2018), held that the debt at issue was *not* discharged, for fact-specific reasons. Nothing in that case turned on the court's supposed answer to the question presented here. The same is true of *In re Renfrow*, 2017 WL 6541136 (Bankr. N.D. Okla.), and *In re Slater*, 573 B.R. 247 (Bankr. D. Utah 2017). Of course, even taking petitioner's assertion at face value, an issue that comes up just 11 times in 12 years is not one that arises sufficiently often to warrant this Court's attention.

Second, in the circumstances of this case, petitioner is wrong that "[t]here is an overriding (even *constitutional*) importance of achieving national 'uniform[ity]' in the bankruptcy context." Pet. 25.

The question whether or not to impose sanctions is a discretionary one that turns on the unique equities of each case. See, *e.g.*, *In re Fierke*, 567 B.R. 322, 325 n.4 (Bankr. W.D. Mich. 2017) (citing *Electric Workers Pension Tr. Fund* v. *Gary's Elec. Serv. Co.*, 340 F.3d 373, 378 (6th Cir. 2003)) ("[A] decision on a contempt petition is within the sound discretion of the trial court."). Although courts sitting in equity "exercise judgment in light of prior precedent," they do so first and foremost with an eye to the "specific circumstances" of the case and whether those circumstances warrant "special treatment." *Holland* v. *Florida*, 560 U.S. 631, 650 (2010). In this way, a court's exercise of its equitable power requires "delicate judgment calls" based on an "interplay of

factors" that are unique in each case. *In re Rental Sys., LLC*, 511 B.R. 882, 894 (Bankr. N.D. Ill. 2014). The upshot is clear: Even when a Section 524(a)(2) discharge injunction is violated, "[i]t is within the sound discretion of the court to refuse to hold persons in contempt." *In re Revere Copper & Brass, Inc.*, 29 B.R. 584, 588-589 (Bankr. S.D.N.Y. 1983) (citing *In re Porter*, 25 B.R. 425, 428 (Bankr. D. Vt. 1982)) (violation of automatic stay).

Moreover, as noted earlier, even after holding an individual liable for contempt, courts have "declined to award damages for discharge injunction violations when such an award would be inappropriate under the circumstances." *In re Hardej*, 563 B.R. 855, 866 (Bankr. N.D. Ill. 2017) (collecting cases). Thus, even if good faith were not "a defense to liability" for contempt, it would still be possible for a contemnor "to raise its good faith belief * * * as a means of mitigating damages." *Murphy*, 892 F.3d at 39.

Against this backdrop, context-dependent outcomes are both predictable and understandable. It is therefore wrong to say that "petitioner would have prevailed had these proceedings occurred in Florida, Ohio, Massachusetts, or Virginia, but he lost due to the happenstance that his bankruptcy case arose in Oregon." Pet. 25. While judges in any of those jurisdictions *might* have imposed sanctions upon respondents, they also *might* have declined to do so in their equitable discretion.

For example, in *In re Ben Franklin Hotel Associates*, 186 F.3d 301 (3d Cir. 1999), the Third Circuit agreed that the debtor's state court suit for money damages was a discharge violation, but held that it was not "contemptuous because, *inter alia*, considering the unusual facts of this case, there was at least a colorable argument that [the creditors'] claims for

monetary damages had been preserved." *Id.* at 309. That was just what the court in this case held.[8]

As Judge Paez stressed at the October 3, 2017 hearing below, moreover, "the BAP's opinion is limited to these circumstances, where the party went back and sought a determination," and "that's a unique circumstance," and "it's not often you see that." CA9 Oral Arg. Video 28:21-28:43, goo.gl/VL3gfS. Given

---

[8] Other courts routinely hold that a good faith belief that a debt was not discharged is a defense to imposition of sanctions in circumstances like these. See, *e.g.*, *Romanucci & Blandin, LLC* v. *Lempesis*, 2017 WL 4401643, at *4 (N.D. Ill. 2017) (agreeing that reasonable belief that debt is not discharged is a defense to sanctions but affirming award because "appellants offer no explanation * * * as to why [they] believed that the discharge did not apply"); *In re Hardej*, 563 B.R. 855, 866-867 (Bankr. N.D. Ill. 2017) (declining to impose damages in nearly identical circumstances as these); *In re Moore*, 2017 WL 934641, at *6 n.41 (Bankr. N.D. Okla. 2017) (holding that sanctions would not be warranted if the creditor "had a good faith basis to believe the penalties were not discharged"); *In re Wilson*, 527 B.R. 635, 638 (Bankr. N.D. Cal. 2015) (sanction against the IRS was limited to returning funds because its position that the penalty had not been discharged was not without merit); *In re Barr*, 457 B.R. 733, 738 (Bankr. N.D. Ill. 2011) (declining to impose sanctions because creditor "believed in good faith that its debt was not discharged by the discharge order"); *In re Everly*, 346 B.R. 791, 797-798 (B.A.P. 8th Cir. 2006) (where creditor has a "good faith basis for believing that its debt was excepted from discharge * * *, the creditor is not subject to sanctions for violating the discharge injunction"); *In re Kuhl*, 2005 WL 8146346, at *3 (E.D.N.Y. 2005) (declining to impose damages where the creditor "lacked the knowledge, and the willfulness, that its actions were in violation of" the discharge injunction), vacated on other grounds, *Kuhl* v. *United States*, 467 F.3d 145 (2d Cir. 2006) (per curiam) (failure to exhaust administrative remedies); *In re Kewanee Boiler Corp.*, 297 B.R. 720, 736-737 (Bankr. N.D. Ill. 2003) (denying debtor's claim for contempt sanctions when creditor "had a good faith and colorable basis for asserting that there had been no discharge").

these "unique circumstance[s]," it is impossible to say that the outcome would have been different in the Eleventh Circuit or anywhere else.

C. This case is a poor vehicle for reaching the question presented

1. Even assuming petitioner were correct that there is some disagreement among the lower courts and that the question presented is important, this case would be a poor vehicle for addressing it. That is because the BAP held that respondents did not violate the discharge injunction at all (Pet. App. 46a-47a), meaning that respondents could not be sanctioned regardless of the answer to the question presented.

As the BAP explained, "[d]ue to the *Ybarra* rule, the scope of the discharge order here was ambiguous with respect to the post-discharge attorneys' fees and costs." Pet. App. 46a. Any creditor "seeking to invoke the *Ybarra* rule" in circumstances like these "would necessarily need to seek * * * a determination from a court" whether the fee award was discharged. *Ibid.* Again, respondents did that, raising the *Ybarra* issue in the state court proceedings. Because "Section 524(a)(2) clearly was not designed to prohibit actions that seek an *Ybarra* determination," the BAP held that "following this procedure [did not] equate[] to a violation of [Section] 524(a)(2)." *Ibid.*

The Ninth Circuit did not disturb that inherently fact-dependent holding. See Pet. App. 14a ("express-[ing] no opinion as to whether" respondents "violate[d] the discharge injunction"). Thus, it makes no difference in this case whether respondents' reasonable, good faith reliance on the state court's *Ybarra* ruling is a defense to contempt. Either way, respondents did not violate petitioner's discharge injunction and cannot be held liable for contempt.

2. Petitioner says (Pet. 27) that respondent Lorenzen "has since conceded *that the discharge was violated*, leaving the good-faith defense as the sole remaining issue in dispute." That is mistaken.

At the same time that petitioner appealed the BAP's reversal of sanctions, respondents cross-appealed the district court's reversal of the bankruptcy judge's original *Ybarra* holding. During the pendency of the combined appeal, however, the Ninth Circuit decided *In re Castellino Villas*, 836 F.3d 1028 (9th Cir. 2016), which limited *Ybarra*'s "return to the fray" framework to those cases where liability for post-petition fees was not within the "fair contemplation" of the claimant. *Id.* at 1034-1037. Concluding that respondents' entitlement to fees in the state court l'tigation was within her contemplation during the bankruptcy, respondent Lorenzen took the view that *Castellino Villas* controlled and required affirming the district court's *Ybarra* ruling. Pet. App. 14a n.6. She thus withdrew her cross-appeal. *Ibid.*

Petitioner characterizes this as a concession that the discharge injunction was violated. It is not. All Lorenzen acknowledged was that, in light of *Castellino Villas*, she was not entitled to obtain an award of attorneys' fees in the state court litigation.

That is not the same thing as Lorenzen admitting that her conduct violated the discharge injunction. On the contrary, the BAP held in favor of respondents on the discharge issue, not because respondents necessarily had the better of the *Ybarra* argument, but because the scope of the discharge was ambiguous in light of *Ybarra* and thus required resolution by a court. See Pet. App. 46a. Respondents' conduct in seeking a court order therefore did not violate Section 524(a)(2), regardless of *Castellino Villas*.

Setting that aside, the remaining respondents did not withdraw their cross-appeal or concede *Castellino Villas*'s applicability. The question whether they violated the discharge injunction thus remains a live issue regardless. Petitioner is entirely wrong to say that the outcome of this case turns on solely on resolution of the question presented.

D. Petitioner's attempt to conflate a violation of the automatic stay with a violation of the discharge injunction is unpersuasive

There is no conflict, the issue is unimportant, and the BAP issued an alternative holding. These are reasons enough to deny the petition. On top of that, the lower court is correct.

1. In *Zilog*, the Ninth Circuit held that "[a] contempt order entered for violation of [a discharge injunction] is governed by the same standards * * * applicable to all civil contempt proceedings." 450 F.3d at 1008 n.12 (citing *Dyer*, 322 F.3d at 1191-1192). According to those standards, it is a "well-established proposition that only actual knowledge of the discharge injunction suffices for a finding of contempt," requiring knowledge of both "the discharge injunction *and* its applicability to [the] claims [in question]." *Id.* at 1008-1009 (emphasis added). That is because, as a general matter, "invocation of the [district court's] inherent power" to sanction a contemnor for violating a court order "would require a finding of bad faith." *Chambers*, 501 U.S. at 49 (citing *Roadway Express, Inc.* v. *Piper*, 447 U.S. 752, 767 (1980)). See also *id.* at 50 (a court imposing sanctions under its inherent

power for violating a discovery order must make "the requisite bad faith" finding).[9]

In *Hardy*, the Eleventh Circuit held that bad faith is not a prerequisite to a sanctions award entered pursuant to Section 105(a). See 97 F.3d at 1390. In the Eleventh Circuit's (since-abrogated) view, a debtor must show only that the alleged contemnor was "aware of the discharge injunction" and "intended the actions which violated the [injunction]." *Ibid.*

But in making that statement, the Eleventh Circuit undertook no actual analysis of the issue. Instead, it merely cited an automatic-stay case—*Jove Engineering, Inc.* v. *IRS*, 92 F.3d 1539 (11th Cir. 1996)—and unthoughtfully asserted that the framework for deciding violations of Section 362's automatic stay "is likewise applicable to determining willfulness for violations of the discharge injunction of [Section] 524." *Hardy*, 97 F.3d at 1390.

That is plainly wrong. Section 362 uses language materially different from the language in Sections 524(a)(2) and 105(a). It states in relevant part that the filing of an initial bankruptcy petition "operates as a stay" against collection efforts and that "an individual injured by any *willful* violation" of the automatic stay "*shall* recover actual damages, including costs and attorneys' fees." 11 U.S.C. 362(a), (k)(1) (emphasis added). That language is notable because it requires an assessment of damages (the debtor "shall" recover)

---

[9] Although *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187 (1949), suggests that any willful violation of a court order is sanctionable in contempt and that "the state of mind of respondents" is irrelevant (*id.* at 191), the accepted rule in the bankruptcy context is that good faith is a defense to contempt sanctions imposed under the court's inherent authority. See *Hardy*, 97 F.3d at 1390 ("[A] defendant may be cited for contempt under the court's inherent powers only upon a showing of 'bad faith.'").

for any and all violations that are "willful" (not merely those that are in bad faith).

Section 524(a)(2) is quite different. It provides that a bankruptcy discharge "operates as an injunction" against collection efforts but does not include an enforcement provision. Instead, Section 105(a) provides separately that "[t]he court *may* issue any order, process, or judgment that is *necessary or appropriate* to carry out the provisions of this title." 11 U.S.C. 105(a) (emphasis added). Thus, a court's award of damages for a violation of Section 524(a)(2) is only permissive, and even then damages are allowed only when *necessary or appropriate*. In other words, Section 105(a) allows far broader discretion to enforce (or not enforce) violations of Section 524(a)(2).

It is therefore wrong to say, as did the Eleventh Circuit, that the test for a violation of the automatic stay under Section 362 is "likewise applicable" (*Hardy*, 97 F.3d at 1390) to alleged violations of the discharge injunction under Section 524. Congress demonstrated in Section 362 that it knows how to impose mandatory damages for willful violations when it wishes to. Indeed, it did so in Section 7433(e) as well. Yet Congress omitted the same language from Sections 524(a)(2) and 105(a).

That observation is dispositive here. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello* v. *United States*, 464 U.S. 16, 23 (1983). Put another way, "[i]f Congress had wanted" to impose a mandatory damages for any willful violation of a discharge injunction, it "would have said so" because "other statutes, in other contexts, speak in

just that way." *Descamps* v. *United States*, 570 U.S. 254, 267-268 (2013).

2. There is good reason, moreover, for treating a violation of an automatic stay differently from a violation of a statutory discharge injunction. The automatic stay under Section 362 is temporary and demands strict enforcement at the outset of the bankruptcy, when the estate is at risk of being destroyed altogether. By contrast, the discharge (which is permanent) comes at the conclusion of the bankruptcy proceedings, when the debtor is on surer footing.

While of course creditors should not be permitted to violate a duly entered discharge order, it is not clear that such a violation should be treated differently from a creditor's mistaken effort to collect a debt that has already been satisfied or for which the statute of limitations has expired. Creditors are not liable at common law for incidental damages or attorneys' fees in such cases—the debtor simply receives back what was wrongly collected. See generally W. E. Shipley, *Recovery for Mental Shock or Distress in Connection with Injury to or Interference with Tangible Property*, 28 A.L.R. 2d 1070 (1953, with supplements); Joel E. Smith, *Recovery by Debtor, Under Tort of Intentional or Reckless Infliction of Emotional Distress, for Damages Resulting from Debt Collection Methods*, 87 A.L.R. 3d 201 (1978, with supplements).

That matters because Congress presumptively incorporates common law standards into the Bankruptcy Code. *Kolstad* v. *American Dental Ass'n*, 527 U.S. 526, 537 (1999) (enactments presumptively consistent with common law); *Field* v. *Mans*, 516 U.S. 59, 73-74 (1995) (principle applied to bankruptcy).

Hardy did not consider any of these basic points, unthinkingly conflating a violation of the automatic

stay with a violation of the discharge injunction. That is indefensible.

3. Petitioner and his *amici* suggest that, under the Ninth Circuit's rule, bankruptcy discharges will be rendered useless, throwing the bankruptcy system into turmoil. See Pet. 23-24; Wedoff Amicus Br. 13-23. They are wrong.

As an initial matter, we do not disagree that the Code's discharge provision is essential to the proper functioning of the bankruptcy system. Nor do we dispute that the honest debtor should have the benefit of discharge free from harassing creditors. But that is not what this case is about.

The question here is relevant only in cases where the scope of the discharge is ambiguous and the creditor seeks a court order resolving the ambiguity. In that circumstance, a creditor ought to be able to request and obtain a court's determination of the discharge's scope without fear of sanctions if the discharge is ultimately found applicable. And when creditors obtain a court order declaring that the discharge does *not* apply, they should not be liable for contempt of court merely because the order is later reversed on appeal. To conclude otherwise would discourage creditors from lawfully pursuing *non*-discharged debts, in practical effect expanding the scope of a debtor's injunction beyond what the Code provides. There is no support for such an outcome.[10]

In any event, the Ninth Circuit's rule has already governed for longer than 12 years across nine States

---

[10] Petitioner and his *amici* raise the specter of the Ninth Circuit's good faith rule being used to excuse serious creditor misconduct. *E.g.*, Wedoff Amicus Br. 13. To the extent that is a real concern (and there is no evidence that it is), the Court should await a case that presents such facts.

comprising approximately one fifth of the national population—and in all that time, it is has not led to any systematic problems. That is likely because, as Judge Paez emphasized at the oral argument below, these are "unique circumstances" that don't often arise. CA9 Oral Arg. Video 28:21-28:43.

CONCLUSION

The petition should be denied.

Respectfully submitted.

JANET M. SCHROER
Hart Wagner, LLP
1000 SW Broadway
Suite 2000
Portland, Oregon 97205

JAMES RAY STREINZ
Streinz Law Office LLC
7830 SW 40th Avenue
Suite 1
Portland, Oregon 97219

Counsel for
Shelley A. Lorenzen

MICHAEL B. KIMBERLY
Counsel of Record
PAUL W. HUGHES
Mayer Brown LLP
1999 K Street NW
Washington, DC 20006
(202) 263-3000

Counsel for All Respondents

HOLLIS K. MCMILAN
Hollis K. McMilan, P.C.
4504 SW Corbett Avenue
Suite 210B
Portland, OR 97239

Counsel for Terry W. Emmert; Keith Jehnke; and Sherwood Park Business Center, LLC

DECEMBER 2018

APPENDICES

APPENDIX A

United States District Court, D. Oregon.
Bradley Weston TAGGART, Appellant,
v.
Stuart M. BROWN, et al., Appellees.
No. 3:12–cv–00236–MO

Aug. 6, 2012

Attorneys and Law Firms

Damon James Petticord, Damon J. Petticord, PC, John M. Berman, Tigard, OR, for Appellant.

James Ray Streinz, Tyler J. Bellis, McEwen Gisvold, LLP, Portland, OR, Tyler D. Smith, Tyler D. Smith, PC, Canby, OR, for Appellees.

OPINION AND ORDER

MOSMAN, District Judge.

Appellant, Bradley Taggart, appeals a United States Bankruptcy Court decision denying his motion for contempt against appellees, Terry Emmert, Keith Jehnke, Stuart Brown, and Sherwood Park Business Center LLC ("SPBC"), in which he alleges that appellees violated his 11 U.S.C. § 524 ("§ 524") discharge injunction. For the following reasons, I reverse and remand this case to the bankruptcy court.

BACKGROUND

This dispute stems from a Washington County Circuit Court lawsuit revolving around uncertain ownership interests in SPBC. Mr. Taggart transferred his 25% stake in SPBC to BT of Sherwood LLC ("BT"), an LLC that he formed, and then subsequently sold

his interest in BT to his attorney in this appeal, John Berman. SPBC sued Mr. Taggart, Mr. Berman, and BT over the purported conveyance, alleging that Mr. Taggart maintained the 25% interest in SPBC because he failed to provide notice or proof of transfer. Plaintiff countersued appellees SPBC, Mr. Jehnke, and Mr. Emmert for attorney fees pursuant to Section 13.6 of the SPBC Operating Agreement and Or. Rev. Stat. § 20.105. (Appellant's Brief [87–5] 3). The state court case was stayed when Mr. Taggart filed for Chapter 7 bankruptcy. As part of his discharge, which was granted on February 23, 2010, the bankruptcy trustee discharged the counterclaim for attorney fees back to Mr. Taggart. When the state court case reconvened, Mr. Berman filed a motion to dismiss Mr. Taggart from the case. The judge denied the motion, finding that Mr. Taggart was a non-dispensable party, but ruled that no money judgment would be entered against him. (*Id.* [87–6] 23). After a trial, the court ruled that Mr. Taggart still owned a 25% interest in SBPC and that Mr. Emmert and Mr. Jehnke were entitled to purchase Mr. Taggart's interest in accordance with the terms of the SPBC Operating Agreement. (*Id.* at 31). The judge also dismissed Mr. Taggart's counterclaims with prejudice. (*Id.* at 32).

All appellees subsequently sought attorney fees from Mr. Taggart, and SPBC alone was awarded approximately $45,000. The state court judge, citing *In re Ybarra*, 424 F.3d 1018, 1021 (9th Cir.2005), reasoned that attorney fees could be assessed against Mr. Taggart despite his bankruptcy discharge, because he never abandoned his counterclaim for attorney fees and because he continued to seek dismissal from the lawsuit post-petition, which if successful, would have given him a contractual right to attorney fees. Thereafter, Mr. Taggart re-opened his bankruptcy case and

filed a Motion to Hold Stuart M. Brown, Terry W. Emmert and Keith Jehnke in Contempt for Violating Discharge Injunction Under 11 U.S.C. § 524. (*See* Appellant's Brief [87–2] 1). In denying the contempt motion, the bankruptcy court reiterated that the § 524 discharge injunction was inapplicable because Mr. Taggart reentered the fray of the state court lawsuit.

STANDARD OF REVIEW

A bankruptcy court's "conclusions of law [are reviewed] de novo and its factual findings for clear error." *In re Su*, 290 F.3d 1140, 1142 (9th Cir.2002). The Ninth Circuit applies "de novo review to 'mixed questions' of law and fact," because such cases "require consideration of legal concepts and the exercise of judgment about the values that animate the legal principles." *In re Beverly*, 374 B.R. 221, 230 (B.A.P. 9th Cir.2007); *see also In re Brawders*, 503 F.3d 856, 866 (9th Cir.2007). This case involves largely undisputed facts and a mixed question of law and fact, and therefore, I review de novo the Bankruptcy Court's decision.

DISCUSSION

"A Chapter 7 bankruptcy discharge releases the debtor from personal liability" for pre-bankruptcy debts. *In re Ybarra*, 424 F.3d at 1022. A Chapter 7 bankruptcy discharge also "operates as an injunction against the commencement or continuation of an action, [or] the employment of ... an act, to ... offset any such debt as a personal liability of the debtor." 11 U.S.C. § 524(a)(2). Mr. Taggart alleges that appellees violated his § 524 injunction by seeking attorney fees in connection with their continuation of the aforementioned pre-petition state court lawsuit. A debtor alleging a violation of § 524 must bring a motion for contempt under 11 U.S.C. § 105(a) (" § 105(a)") of the

bankruptcy code. *See Walls v. Wells Fargo Bank, N.A.*, 276 F.3d 502, 509–10 (9th Cir. 2002).

A party must "knowingly" violate the discharge injunction in order to be held in contempt under § 105(a). *In re Zilog, Inc.*, 450 F.3d 996, 1007 (9th Cir. 2006) (citing *Walls*, 276 F.3d at 507). In order to demonstrate a knowing violation, Mr. Taggart must prove by clear and convincing evidence that appellees: "(1) knew the discharge injunction was applicable and (2) intended the actions which violated the injunction." *Id.*

The threshold issue, however, is whether appellees' request for attorney fees in connection with the pre-petition state court lawsuit that was recommenced subsequent to Mr. Taggart's discharge implicates the § 524 injunction. If the claim for attorney fees was not discharged, there inevitably can be no knowing violation of the injunction. The Ninth Circuit holds that "claims for attorney fees and costs incurred post-petition are not discharged where post-petition, the debtor voluntarily commences litigation or otherwise voluntarily 'return[s] to the fray.' " *In re Ybarra*, 424 F.3d at 1026 (quoting *Siegel v. Fed. Home Loan Mortg. Corp.*, 143 F.3d 525, 533–34 (9th Cir. 1998)). "Whether attorney fees and costs incurred through the continued prosecution of litigation initiated prepetition may be discharged depends on whether the debtor has taken affirmative post-petition action to litigate a prepetition claim and has thereby risked the liability of these litigation expenses." *Id.* Since *Ybarra*, the Ninth Circuit has not had occasion to expound on the requisite level of affirmative and voluntary action necessary to constitute returning to the fray.

In *Ybarra*, the debtor filed a state court employment discrimination lawsuit against her former employer, and then three years later filed for Chapter 11 bankruptcy. *Id.* at 1020. She did not list the lawsuit on her bankruptcy schedule. *Id.* The employer subsequently learned of the bankruptcy proceedings and moved to convert the case to Chapter 7, which the bankruptcy court did, leading to the debtor's bankruptcy estate trustee settling the case with the former employer for $17,500. *Id.* The bankruptcy court approved the settlement over the debtor's objections and the state court dismissed the lawsuit. *Id.* The debtor petitioned the bankruptcy court to exempt the state suit, which led to an appeal to the Ninth Circuit, and ultimately a remand back to the bankruptcy court, with the latter court holding that the case was exempt and that the debtor could either accept the settlement offer or take ownership of the lawsuit. *Id.* Opting for the latter, the debtor persuaded the state court to set aside the dismissal but ultimately lost at summary judgment. *Id.* The former employer then moved for an award of attorney fees and costs and was awarded $456,884.03. *Id.* at 1021. The Ninth Circuit affirmed the bankruptcy court's decision allowing the former employer to collect approximately $150,000 in attorney fees that were incurred after the filing of the debtor's bankruptcy petition. *Id.* at 1027. The Court elaborated that the debtor's actions in reviving the state court action were "sufficiently voluntary and affirmative to be considered 'returning to the fray.' " *Id.*

The parties both cite *In re Kozak*, 03–20278–MT, 2007 Bankr. LEXIS 4548 (Bankr. C. D. Cal. Sept. 10, 2007), an unpublished case from the United States Bankruptcy Court for the Central District of California. In *Kozak*, the debtors entered into a settlement agreement with Packing Crate Classics, Inc. ("PCC")

regarding a dispute over a residential property ("the property"). *Id.* at *3. The debtors were leasing the property from PCC at the time of settlement, and it was subsequently the subject of two lawsuits. *Id.* First, the debtors sued PCC alleging that it breached the settlement agreement by not allowing them to purchase the property. *Id.* The state court ruled for PCC and the debtors appealed. *Id.* The second lawsuit arose while the appeal was pending when a third party sued both PCC and the debtors over the property; the debtors filed a cross-complaint against PCC, which essentially alleged the same claims as the first lawsuit. *Id.* In the meantime, the debtors filed for bankruptcy and were granted a discharge. *Id.* at *4. The debtors' Chapter 7 trustee filed an application to employ outside legal counsel, employed on behalf of the estate, for the purpose of pursuing both lawsuits for the debtors. The state court of appeals rejected the appeal in the first lawsuit and PCC filed a motion for attorney fees. *Id.* at *4–5. Because the ruling in the first lawsuit essentially covered the same claims that the debtors brought in the second lawsuit, PCC requested that the trustee's attorney drop the counter-complaint. *Id.* at *5. The trustee's attorney then filed a motion to be dismissed as debtors' counsel, which was granted. *Id.* at *7. Thereafter, the state court granted PCC summary judgment on the debtors' counter-complaint in the second lawsuit, and PCC filed a second motion for attorney fees. *Id.* at *8. Debtors, now pro se, filed an appeal of the summary judgment ruling, as well as an objection to PCC's proposed order awarding attorney fees. *Id.* at *9.

The *Kozak* court held that PCC was entitled to fees from the second lawsuit only, finding: (1) the debtors did not return to the fray in the first lawsuit because the trustee pursued the litigation; and (2) the

debtors' failure to seek dismissal of the cross-complaint in the second lawsuit constituted returning to the fray, because the debtor's failure to respond to PCC's request to dismiss their counter-complaint forced PCC "to take action in response to the pending [crosscomplaint] or possibly face judgment themselves," and because the debtors' actions "demonstrated more than a passive lack of response." *Id.* at *20; *0–21. The court noted that the following post-discharge actions on behalf of the debtors gave PCC "every indication that they were pursuing their cross-complaint": they appeared at the summary judgment hearing and indicated to court they were still pursuing their complaint, they attended numerous status conferences, they filed an opposition on the merits to the summary judgment motion in which they argued their cross-complaint should not be dismissed, and they requested an extension of time to exchange expert witness information. *Id.* at 21.

This case is unlike *Ybarra* in the sense that Mr. Taggart did not commence the litigation at issue here, nor can the state court case be considered the commencement of a new suit. He did bring a counterclaim for attorney fees prepetition, which was eventually discharged back to him upon resolution of his Chapter 7 case, and which he never affirmatively moved to dismiss postpetition. Mr. Taggart's remaining involvement in the lawsuit post-discharge is described as follows. Prior to trial, Mr. Berman filed a motion for a protective order on behalf of Mr. Taggart in which he requested that a subpoena for Mr. Taggart's second deposition be quashed, as well as for attorney fees in connection with the motion. (Appellant's Brief [87–5] 35–37). Mr. Berman also filed a pretrial motion to dismiss in which he sought to dismiss

the claims against Mr. Taggart pursuant to his Chapter 7 discharge. (*Id.* [87–6] 14–15). Mr. Berman renewed the motion orally at the close of evidence. After the trial, and after appellees in this case submitted a proposed form of judgment that included their request for attorney fees from Mr. Taggart, Mr. Berman filed an objection on behalf of himself and BT, in which he also argued that no attorney fees or costs, pre or post-bankruptcy, could be assessed against Mr. Taggart pursuant to *In re Ybarra*. (*Id.* [87–10] 41). Mr. Taggart testified at the bankruptcy court oral argument that Mr. Berman prepared the motion for him in part. At the hearing with regard to Mr. Berman's objection, Mr. Taggart, who the state court had previously ruled maintained a 25% interest in SPBS, appeared on his own behalf and argued in entirety that plaintiffs should have to pay interest on the purchase price of his interest in SPBC for the three years that had passed and that any proceeds from the subsequent transaction should go into an escrow account. (*Id.* [87–11] 49). Following the state court judgment, Mr. Taggart personally filed "Objections to Attorney Fees and Costs," (*Id.* [87–9] 14), and a Notice of Appeal (*Id.* [87–12] 10). In the former, he argued that any claim for fees or costs violated his Chapter 7 discharge.

The issue here is whether Mr. Taggart's aforementioned post-discharge actions were sufficiently affirmative and voluntary to constitute returning to the fray of appellees' state court lawsuit. *In re Ybarra*, 424 F.3d at 1026. I first note that Mr. Taggart's objection to a second deposition does not suggest that he voluntarily or affirmatively agreed to return to the fray. Mr. Taggart reacted to what he viewed as an oppressive litigation strategy as opposed to affirmatively committing an act that forced appellees to incur post-petition legal fees. Nor do Mr. Taggart's actions after the state

court dismissed Mr. Taggart's counterclaims constitute returning to the fray. Mr. Taggart did not object to or seek reversal of the state court's decision on the merits. He solely argued that he should not be subjected to attorney fees for the same reason that he asked to be dismissed from the suit at the outset. A consequence of finding that Mr. Taggart's bankruptcy injunction blocked appellees' attorney fee request would not have been reversal of the state court's dismissal of plaintiff's counterclaims. Therefore, on these facts, Mr. Taggart's actions were reactionary and solely in response to a potential judgment against him for attorney fees, as opposed to affirmative and voluntary actions for the purpose of seeking attorney fees himself.

There is still the matter of whether Mr. Taggart, in seeking to be dismissed from the lawsuit pursuant to the § 524 discharge injunction, and in failing to dismiss his counterclaim for attorney fees, voluntarily took affirmative post-petition action to litigate his prepetition counterclaim for attorney fees under Or. Rev. Stat. § 20.105 and Section 13.6 of the SPBC Operating Agreement. In order to prevail on either of these claims, Mr. Taggart would have had to have been adjudicated the "prevailing party" by the state court judge.[1] Because Mr. Taggart did not move to dismiss the claims against him on the merits and did not

---

[1] In order to obtain attorney fees under Or. Rev. Stat. § 20.105, Mr. Taggart would have had to have proven that: (1) he "was the prevailing party"; (2) "the opposing party's claim was meritless"; and (3) "the meritless claim was advanced for an improper purpose." *Scott v. Harold Barclay Logging Co., Inc.*, 987 P.2d 17, 18 (Or.Ct.App.1999) (citing *Mattiza v. Foster*, 803 P.2d 723, 729 (Or.1990)). Section 13.6 of the SPBC Operating Agreement states in relevant part that "the prevailing party shall be entitled to recovery, in addition to other costs, reasonable attorney fees in

otherwise appear or defend in the trial after he was ordered to remain a party, it is unclear whether Oregon law[2] would permit this designation on these facts. If he could not have prevailed on his counterclaim by seeking dismissal from the suit in the fashion he did, it cannot be said that Mr. Taggart took affirmative post-petition action to recommence his pursuit of attorney fees. Neither the SPBC Operating Agreement nor Or. Rev. Stat. § 20.105 defines "prevailing party." *See Mantia v. Hanson*, 77 P.3d 1143, 1148 (Or. Ct. App. 2003) (explaining that Or. Rev. Stat. § 20.105 "includes no definition of 'prevailing party' "); (Appellant's Brief [87–4] 19–37). The issue is irrelevant as to Or. Rev. Stat. § 20.105, as it would have been impossible for Mr. Taggart, who did not defend on the merits in the lawsuit, to then prove that appellees claims themselves were meritless, and that they were advanced for an improper purpose. With regard to the SPBC Operating Agreement, Or. Rev. Stat. § 20.077, which governs attorney fees in civil proceedings, states that "the prevailing party is the party who receives a favorable judgment ... on the claim." Mr. Taggart's judgment of dismissal pursuant to the § 524 discharge injunction would not have been a favorable judgment on the claims, and therefore, he would not

---

connection with [any suit ... to enforce or interpret any provision of this Agreement.]" (Appellant's Brief [87–4] 35).

[2] Section 13.6 of the SPBC Operating Agreement states that "the court" shall decide "the prevailing party and the amount of reasonable attorney fees." (Appellant's Brief [87–4] 35). Section 13.1 states that the Agreement "shall be governed by and interpreted in accordance with the laws of the State of Oregon. (*Id.*). Therefore, the analysis as to whether Mr. Taggart would have been a "prevailing party" if he was dismissed pursuant to the bankruptcy injunction would have been conducted by the Washington County Circuit Court judge pursuant to Oregon law.

have been entitled to attorney fees under the SPBC Operating Agreement either.

Regardless, however, Mr. Taggart's actions do not suggest that his requests for dismissal under the § 524 injunction were for the purpose of continuing his counterclaim for attorney fees, but rather to extricate himself from the lawsuit altogether. Unlike in *Kozak*, the fact that Mr. Taggart failed to affirmatively dismiss his counterclaim does not change the conclusion either, because the appellees here never requested that Mr. Taggart dismiss his counterclaim after arguing that he should remain in the case, nor did Mr. Taggart's failure to seek dismissal of the counterclaim cause appellees to take action themselves lest they face judgment. Lastly, Mr. Taggart's actions in requesting to be dismissed pursuant to his bankruptcy injunction, opposing the second deposition, and failing to dismiss his counterclaim should not have indicated to the appellees that he affirmatively intended to seek attorney fees.

For all of these reasons, Mr. Taggart's actions were not sufficiently affirmative and voluntary to be considered returning to the fray. The bankruptcy court's decision on this issue is reversed and this case should be remanded for consideration of whether Mr. Taggart has proven whether appellees knowingly violated the discharge injunction in seeking attorney fees.

CONCLUSION

The Bankruptcy Court's decision is REVERSED AND REMANDED for further proceedings consistent with my ruling.

IT IS SO ORDERED.

APPENDIX B

UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF OREGON

In Re: BRADLEY WESTON TAGGART,

Debtor.

Bankruptcy Case No. 09-39216-rld7

MEMORANDUM OPINION

On November 14, 2011, I received evidence and heard testimony and argument at the hearing ("Hearing") on debtor Bradley Weston Taggart's ("Mr. Taggart") Motion to Hold Stuart M. Brown, Terry W. Emmert and Keith Jehnke in Contempt for Violating Discharge Injunction under 11 USC § 524 ("Contempt Motion").[3] Hereafter, Messrs. Brown, Emmert and Jehnke will be referred to collectively as the "Respondents" and individually as "Mr. Brown," "Mr. Emmert" and "Mr. Jehnke," as appropriate. The Hearing was limited to issues as to liability. If I decide the Contempt Motion in favor of Mr. Taggart, a further evidentiary hearing will be scheduled to receive evidence and hear testimony as to Mr. Taggart's damages. At the conclusion of the Hearing, I took the matter under advisement.

---

[3] Unless otherwise indicated, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and all "Rule" references are to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037. The Federal Rules of Civil Procedure are referred to as "Civil Rules."

In deciding this matter, I have considered carefully the testimony presented and the exhibits admitted at the Hearing, as well as arguments presented, both in legal memoranda and orally. I further have taken judicial notice of the docket and documents filed in Mr. Taggart's main chapter 7 case, Case No. 09-39216-rld7 ("Main Case"), for the purpose of confirming and ascertaining facts not reasonably in dispute. Federal Rule of Evidence 201; In re Butts, 350 B.R. 12, 14 n.1 (Bankr. E. D. Pa. 2006). In addition, I have reviewed relevant legal authorities, both as cited to me by the parties and as located through my own research.

In light of that consideration and review, this Memorandum Opinion sets forth the court's findings of fact and conclusions of law under Civil Rule 52(a), applicable with respect to this contested matter under Rules 7052 and 9014.

Factual Background

Unfortunately, the proceedings in this court culminating in the Hearing represent no more than one pitched battle in the longstanding disputes among the parties and their counsel. It is neither the beginning, nor I fear, the end. I will refer to the underlying grievances among them only as necessary to set the stage for the filing of the Contempt Motion and its aftermath.

Mr. Taggart was a general contractor, who operated through a corporation, Builders, Inc. Mr. Taggart developed several business parks, anchored by tenants who also were owners. Sherwood Park Business Center, LLC ("SPBC") was formed to build and operate a two-building business park in Sherwood, Oregon. Its Operating Agreement reflects that it was organized on or about October 12, 1999. See Exhibit 1,

at p. 18. Initially, SPBC was owned by four members, each with a 25% member interest: Mr. Taggart, Mr. Jehnke, Mr. John Hoffard and Mr. Anthony Benthin. See id. at p. 19. Mr. Taggart was designated as the Manager. See id. at p. 3. Apparently, at some point, Mr. Emmert succeeded to the member interest of Mr. Benthin in SPBC.

In 2004, Mr. Enunert acquired a 50% ownership interest in Builders, Inc. Thereafter, relations between Mr. Taggart and Mr. Emmert became contentious, and Mr. Taggart ultimately encouraged three creditors to file an involuntary bankruptcy petition against Builders, Inc., which had become insolvent while the SPBC buildings were being constructed. "When SPBC paid approximately $33,000 to Builders, Inc. to be used as a deposit for a steel building, Builders, Inc. used the funds for payroll instead." Taggart Trial Brief ("Taggart Trial Brief"), Main Case Docket No. 50, at p. 2. That conduct ultimately resulted in Mr. Taggart being replaced as the SPBC Manager by Mr. Jehnke. Id.

Mr. Taggart's financial condition subsequently deteriorated further. On July 23, 2007, Mr. Taggart formed BT of Sherwood, LLC ("BT") and transferred his 25% member interest in SPBC to BT. Mr. Taggart was represented by attorney John M. Berman ("Mr. Berman") with respect to the formation of BT and the transfer of Mr. Taggart's member interest in SPBC to BT. Mr. Berman informed counsel for SPBC that the transfer had been made. See Exhibit 2. SPBC's counsel responded that Mr. Taggart had no right to make such a transfer. See Exhibit 3. Mr. Taggart later transferred his entire member interest in BT to Mr. Berman in exchange for payments totaling $200,000. See Taggart Trial Brief, at pp.3-4; and Exhibit 5.

On or about September 24, 2008, SPBC filed a complaint ("Complaint") against Mr. Taggart, BT and Mr. Berman in the Washington County, Oregon Circuit Court ("Circuit Court"), asserting claims for breach of fiduciary duty, expulsion, breach of contract, attorney's fees and declaratory relief (the "Circuit Court Lawsuit"). See Exhibit A. On or about February 24, 2009, SPBC filed a First Amended Complaint ("Amended Complaint") in the Circuit Court Lawsuit, asserting essentially the same claims with elaborating allegations. See Exhibit B.

On October 28, 2009, Mr. Taggart filed an answer ("Answer") to the Amended Complaint, asserting affirmative defenses of failure to state a claim upon which relief could be granted and claim preclusion and stating a counterclaim for attorney's fees against SPBC, Mr. Jehnke and Mr. Emmert. See Exhibit C.

In the meantime, Mr. Taggart's financial condition was not improving. He wanted to be done with SPBC, he wanted to be free of his connections with Mr. Jehnke and Mr. Emmert, and he had no money to fund participation in the Circuit Court Lawsuit. On November 4, 2009, the day that the trial in the Circuit Court Lawsuit was to begin, Mr. Taggart filed for protection under chapter 7 of the Bankruptcy Code. See Main Case Docket No. 1. In his Schedule B list of personal property assets, Mr. Taggart did not include any interest in either SPBC or BT, but he did include a potential attorney fee award on his counterclaim in the Circuit Court Lawsuit. See Exhibit D, at p. 2; Main Case Docket No. 1, Schedule B. The trustee in Mr. Taggart' s chapter 7 case filed a report of no assets available for distribution, and Mr. Taggart received his discharge by order entered on February 23, 2010. See Main Case Docket Nos. 14 and 15. Apparently, all

action in the Circuit Court Lawsuit was stayed while Mr. Taggart's bankruptcy case was pending.

After Mr. Taggart received his discharge, the Circuit Court Lawsuit was revived. In behalf of Mr. Jehnke and Mr. Emmert, Mr. Brown subpoenaed Mr. Taggart for a deposition on April 9, 2010. See Exhibit 10. Mr. Berman, in behalf of Mr. Taggart, filed a motion for a protective order requesting that the subpoena be quashed, supported by the declaration of Mr. Taggart. See Exhibit E. Mr. Taggart argued that he already had been subjected to in 8-hour videotaped deposition in the Circuit Court Lawsuit, and requiring him to submit to a further deposition in the same case was "harassing, annoying and oppressive." Id. at p. 2. In the motion for protective order, Mr. Berman requested attorney's fees in behalf of BT and Mr. Taggart. Id. at p. 3. The Hearing record is unclear as to the ultimate disposition of the motion for a protective order: Mr. Taggart testified that the Circuit Court never ruled on the motion. Mr. Brown testified that it was his understanding that the Circuit Court denied the motion. In any event, Mr. Taggart appeared at the deposition and was deposed by an attorney for Mr. Emmert other than Mr. Brown.

The rescheduled trial ("Trial") in the Circuit Court Lawsuit was set to begin on May 18, 2010. On May 17, 2010, Mr. Berman filed a Motion to Dismiss and corresponding order to dismiss Mr. Taggart from the Circuit Court Lawsuit in behalf of Mr. Taggart. See Exhibit 12. Neither the Motion to Dismiss nor the accompanying order referenced Mr. Taggart's counterclaim for attorney's fees and costs.

The Motion to Dismiss was argued on the first day of the Trial. While counsel for Mr. Jehnke and Mr.

Enunert agreed that they would not be seeking monetary relief against Mr. Taggart, Mr. Brown argued that Mr. Taggart was a necessary party with respect to the expulsion claim. The Circuit Court ruled that no money judgment would be entered against Mr. Taggart but otherwise denied the Motion to Dismiss. See Exhibit 13, which includes the portion of the Trial transcript relating to the Motion to Dismiss. No other portion of the Trial transcript was submitted in evidence at the Hearing. Mr. Brown testified that Mr. Berman orally renewed the Motion to Dismiss in behalf of Mr. Taggart at the end of the Trial, and the renewed motion was denied. Mr. Taggart apparently did not appear or testify at the Trial.

Following the Trial, the Circuit Court generally found in favor of SPBC, and Mr. Brown drafted the Findings of Fact and Conclusions of Law ("Findings and Conclusions") that the Circuit Court signed. See Exhibit H. All counterclaims of Mr. Taggart and BT in the Circuit Court Lawsuit were dismissed with prejudice. See id. at p. 9. The Findings and Conclusions were entered on July 29, 2010.

After a delay of a number of months, Mr. Brown prepared and submitted a form of judgment in the Circuit Court Lawsuit to which Mr. Berman objected. The objections to the form of judgment ("Objection to Judgment") were filed by Mr. Berman as "attorney for Defendants BT of Sherwood LLC and John Berman." See Exhibit J, particularly at p. 7. Mr. Taggart testified that Mr. Berman prepared the Objection to Judgment, in part, for him. The Objection to Judgment contains the following, that I quote at length:

> The reason that no General Judgment has been submitted is because as a matter of federal law no attorney fees or costs, pre- or post-

bankruptcy, can be assessed against Mr. Taggart. Thus, the payment to him for the 25% interest [in SPBC] must be without any such offsets, as explained infra.

Mr. Brown, who submitted this form of General Judgment, is fully aware that he is asking the Court to participate in a violation of federal law. Moreover, he has been told that any attempt to seek such fees or costs will result in a legal proceeding against the responsible parties in the Bankruptcy Court for violation of Mr. Taggart's discharge. It is up to this Court to decide how it wishes to respond when an attorney asks it to violate federal law without even advising this Court that it is being asked to do so.

DETAILS OF OBJECTIONS TO JUDGMENT

A. The proposed judgment states as follows, with the objectionable parts italicized, at page 3 lines 3-6 [:]

"The purchase price shall be the fair market value of [SPBC] multiplied by Taggart's 25% membership interest, *less any unpaid post-bankruptcy petition attorney fees, costs and prevailing party fees which might be assessed against Taggart pursuant to ORCP 68 and ORS Chapter 20 and any necessary proceedings in bankruptcy court or this court.*"

As you may recall, Mr. Taggart concluded that he had assigned his interest and received fair value. He considered himself to have no interest in this proceeding and asked at the commencement of the trial to be dismissed. He

did not appear at trial or participate in any manner.

Under these facts it is a violation of federal law for anyone to attempt to obtain any award of attorney fees against him. Mr. Taggart has received a discharge in bankruptcy, and that discharge includes any liability arising from a continuation of this proceeding.

SPBC insists that he continues to be the owner of the 25% interest, even though Mr. Taggart made no such claim and did not engage in the litigation. SPBC and Messrs. Jehnke and Emmert cannot force the continuation of this litigation on Taggart, and then assert a claim for attorney fees and costs against him.

That was the express holding in In re Ybarra, 424 F[.]3d 1018 (2005), a copy of which is attached to this brief. It held that where a litigant actively asserts claims in litigation post-petition, only then can he be assessed post-petition attorney fees, overruling In re Ybarra, 295 BR 609 (USBAP, 2002), which held that even then attorney fees could not be awarded.

As explained in the Ninth Circuit's decision, and there are numerous other cases that have so held in other jurisdictions, when one is discharged in bankruptcy from liability, including liability associated with prepetition litigation, the fact that the litigation continues without any involvement by the discharged debtor means that no attorney fees or

costs on account of those claims can be asserted against the discharged debtor. His right to a fresh start is preeminent.

The relevant fact is whether the discharged debtor asserted claims in this case post-petition. He did not. Here Taggart did not do so, but actively sought to be dismissed from the case.

In addition, the reference to deducting from the payment to be made to Taggart any fees or costs in this or the Bankruptcy Court is improper, not only for the above reasons, but also because it suggests that this court has some authority to assess attorney fees incurred in some unspecified later bankruptcy court proceeding, or some other proceeding in this court, and to deduct them from what Taggart is owed, for which there is absolutely no basis. Rather, Messrs. Jehnke and Emmert have no legal basis for their claims. They just don't want to pay for what they say they want to buy. This is not an option.

The italicized portion of the judgment quote[d] above violates federal law and must be stricken.

Id. at pp. 1-4.

The Objection to Judgment further states:

The payments must be paid to seller. There is no provision in the Operating Agreement for any escrow account. Messrs. Jehnke and Emmert want to be the owners of the 25% that Mr. Taggart had owned. They have to pay for it, and they have to pay Mr. Taggart for it. Otherwise, Mr. Taggart would be entitled to the rights of an owner, which Messrs. Emmert

> and Jehnke have said terminated on January 1, 2008.

Id. at p. 6.

On May 2, 2011, the Circuit Court held a hearing ("Judgment Hearing") on the form of judgment to be entered in the Circuit Court Lawsuit. Mr. Taggart appeared at the Judgment Hearing, purportedly representing himself. See Exhibit K, at p.1. Mr. Berman also appeared, representing himself and BT, but he stated to the Circuit Court that Mr. Taggart "consents to what I am proposing." Id. Much of the argument focused on when interest would begin to run on the value of Mr. Taggart's SPBC membership interest to be sold and how proceeds to Mr. Taggart from such sale would be distributed. See Exhibit K, at pp.2-14. When Mr. Taggart was called upon to address the Circuit Court, he stated the following:

> MR. TAGGART: Only - the only thing I'd like to say, Your Honor, is that if - if the date is in 2008, then they do - I feel they owe interest on that date. If it's not, then I -I deserved the - the tax benefit from that period of time. They can't have their cake and eat it too, in my opinion, so -
>
> THE COURT: Very well.
>
> MR. TAGGART: Fair is fair. Regarding the bankruptcy, my bankruptcy was discharged before you made your decision. There have been considerable payments made on the taxes already. We don't know what's the totals of those right now. My feeling is that any money that comes out of this should go into either an escrow account or Mr. Berman's trust account until we determine exactly what that number is. They' re hopefully not going to

> be receiving a hundred percent of the proceeds, so -

Id. at p. 16.

The General Judgment ("Judgment") in the Circuit Court Lawsuit was entered on May 26, 2011. See Exhibit L. The Judgment contained the following specific provisions with respect to Mr. Taggart:

> (1) Brad Taggart's attempted transfer of his membership interest in [SPBC] to [BT] violated the Operating Agreement and Oregon law. The transfer is hereby deemed null and void.
>
> (2) Brad Taggart engaged in wrongful conduct as a member of [SPBC]. Brad Taggart is hereby expelled from [SPBC] effective January 1, 2008.
>
> (3) Counterclaim Defendants Emmert and Jehnke have timely elected to purchase Taggart's 25% membership interest. Pursuant to Section 12.5 of the Operating Agreement, the other remaining members of [SPBC], Keith Jehnke and Terry W. Emmert, are entitled to purchase Brad Taggart's 25% membership interest in [SPBC] as follows:
>
> The purchase price shall be the fair market value of the Company as of the date of entry of Judgment multiplied by Taggart's 25% membership interest, less any unpaid post-bankruptcy petition attorney fees, costs and prevailing party fees which might be assessed against Taggart pursuant to ORCP 68 and ORS Chapter 20 and any necessary proceedings in bankruptcy court or this court.

> The fair market value shall be determined by a third-party appraiser acceptable to Jehnke, Emmert and Taggart. Within 90 days of the valuation, Jehnke and Emmert shall pay twenty percent of the purchase price as a downpayment, and the balance shall be paid in 60 substantially equal, consecutive monthly payments, including principal and interest. Interest shall accrue from the date of closing at the prime rate quoted by Wells Fargo Bank at Portland, Oregon on the date that this Judgment is entered. Emmert and Jehnke may prepay some or all of the outstanding balance at any time without penalty or additional interest.

Judgment, Exhibit L, at pp. 1-2.

Both Mr. Taggart and BT appealed the Judgment. Mr. Taggart testified that he is representing himself in the appeal, but he acknowledged that Mr. Berman assisted him in preparing the Notice of Appeal. See Exhibit O.

Thereafter, Mr. Brown filed a petition for costs and attorney's fees ("Petition") in behalf of SPBC, Mr. Jehnke and Mr. Emmert in the Circuit Court Lawsuit. See Exhibit M. The Petition reflected the understanding that any liability of Mr. Taggart for fees "would be limited to fees incurred after he filed for bankruptcy on November 4, 2009 . . , " citing Boeing North American, Inc. v. Ybarra (In re Ybarra), 424 F. 3d 1018 (9th Cir. 2005). Id. at p. 4. At oral argument on the Petition, Mr. Brown clarified that fees and costs were sought from Mr. Taggart only for the period following the date of his discharge, February 23, 2010. See Exhibit R at p. 3 (p. 11 of the hearing transcript). Mr.

Taggart filed objections to the Petition pro se, supported by a Hearing Memorandum prepared by Mr. Berman as Mr. Taggart's attorney. See Exhibit 19. Mr. Brown filed a Reply Memorandum in behalf of SPBC, Mr. Jehnke and Mr. Emmert. See Exhibit P. Mr. Berman called and examined Mr. Taggart as a witness at the hearing on the Petition. See Exhibit R, at pp. 5-6 (pp. 17-21 of the hearing transcript). At the conclusion of the hearing on the Petition, the Circuit Court took the matter under advisement.

On August 11, 2011, the Circuit Court issued a letter opinion ("Letter Opinion") addressing the Petition. See Exhibit Q. The Letter Opinion states the following with respect to Mr. Taggart:

> The court notes that In re Ybarra, 424 F[.]3d 1018 (9th Cir. 2005) holds that the trial court has power to award post-petition attorney fees against a debtor who continues to pursue litigation post-petition that had been begun pre-petition. This is consistent with the federal case law the court reviewed.
>
> Taggart filed an answer that was file stamped October 28, 2009. The answer contained a counterclaim for attorney fees based on Section 13.6 of the Operating Agreement. The answer also sought to have plaintiff's claim to be dismissed against him. This was consistent with the oral Motion to Dismiss raised at the time of trial. Taggart never abandoned his counterclaim for attorney fees. Rather he continued to pursue his position post-petition that the plaintiff's claim against him be dismissed which, if successful, would have led to Taggart having a contractual right to obtain attorney fees.

> The court awards attorney fees in favor of BT of Sherwood [sic-actually, SPBC] in the amount sought at oral argument. My notes are difficult to decipher but I believe that amount was $44,691.50. (It may be accurately $44,611.50 as the ten column is the one I am having trouble reading.) Costs and disbursements sought as well as the standard prevailing party fee are also appropriate.
>
> [SPBC] is the prevailing party with respect to Brad Taggart (as noted above) . . . .

Exhibit Q, at pp. 1-2.

In the meantime, on July 13, 2011, Mr. Taggart had filed the Contempt Motion, as supplemented by allegations on August 15, 2011. See Main Case Docket Nos. 24 and 31-32. Following the filing of opposition papers and preliminary proceedings, as noted above, the Contempt Motion proceeded to the evidentiary Hearing on November 14, 2011. See Main Case Docket No. 63. At the Hearing, Mr. Taggart testified that his deal with Mr. Berman is if he receives anything for the value of the contested membership interest in SPBC, the proceeds will be split half to him to pay tax obligations and half to Mr. Berman.

Jurisdiction

I have jurisdiction to decide the Contempt Motion under 28 U.S.C. §§ 1334, 157(b)(1) and 157(b)(2)(I) and (O).

Discussion

The question before me is whether the Respondents violated the discharge injunction provided for in § 524(a)(2) by continuing to prosecute the Circuit Court Lawsuit against Mr. Taggart to the point of requesting an offsetting award of attorney's fees and

costs against him after he received his discharge in his chapter 7 bankruptcy case. Section 524(a)(2) provides that, "A discharge in a case under this title - (2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived . . . ."

Procedurally, an alleged violation of the discharge injunction is pursued, as in this case, by a motion invoking the contempt remedies allowed for in § 105(a). See Walls v. Wells Fargo Bank, N.A., 276 F.3d 502, 509-10 (9th Cir. 2002). In order to be subject to sanctions for violating the discharge injunction, a party's violation must be "willful." The Ninth Circuit has adopted a two-part test to determine whether the willfulness standard has been met: 1) Did the alleged offending party know that the discharge injunction applied; and 2) did such party intend the actions that violated the discharge injunction? See Zilog, Inc. v. Corning (In re Zilog, Inc.), 450 F.3d 996, 1007 (9th Cir. 2006); Hardy v. United States (In re Hardy), 97 F.3d 1384, 1390 (9th Cir. 1996). The burden of proof for the moving party is clear and convincing evidence. See In re Zilog, Inc., 450 F.3d at 1007; Renwick v. Bennett (In re Bennett), 298 F.3d 1059, 1069 (9th Cir. 2002) ("The moving party has the burden of showing by clear and convincing evidence that the contemnors violated a specific and definite order of the court.").

Where litigation is commenced prepetition and is recommenced postpetition or postdischarge, the Ninth Circuit has set forth the standards to determine whether the continued prosecution of such litigation violates the discharge injunction of § 524(a)(2) in Boeing North American, Inc. v. Ybarra (In re Ybarra), 424 F.3d 1018 (9th Cir. 2005). The ultimate question is

whether the discharged debtor has voluntarily "returned to the fray" in the renewed litigation. Siegel v. Federal Home Loan Mortg. Corp., 143 F.3d 525, 533-34 (9th Cir. 1998).

In re Ybarra is the saga of a die-hard litigant who paid the ultimate price for her belief in her claims. Ms. Ybarra sued her former employer, Rockwell International Corporation ("Rockwell"), originally in 1988. In her Fifth Amended Complaint, filed in April 1991, Ms. Ybarra asserted two causes of action against Rockwell: 1) employment discrimination in violation of California Government Code § 12940; and 2) violation of the covenant of good faith and fair dealing. In re Ybarra, 424 F.3d at 1020. On December 10, 1991, Ms. Ybarra filed a chapter 11 bankruptcy petition, but she did not disclose her claims against Rockwell in her schedules. Id. Rockwell first learned of Ms. Ybarra' s bankruptcy case in 1993 and moved to convert the case to chapter 7. Id. Rockwell's motion was granted, and the case was converted in June 1993. Id.

Rockwell negotiated a $17,500 settlement of Ms. Ybarra's claims with the chapter 7 trustee, to which Ms. Ybarra objected. Id. However, the bankruptcy court approved the settlement over Ms. Ybarra's objections on November 12, 1993. Id. Thereafter, the state court granted the trustee's and Rockwell's motion to dismiss Ms. Ybarra's lawsuit. Id.

In the meantime, Ms. Ybarra had amended her schedule of exempt property to add her lawsuit against Rockwell. Rockwell objected to her amended exemption claim, and the bankruptcy court sustained Rockwell's objection. Id. That decision was reversed by the Bankruptcy Appellate Panel, which was affirmed by the Ninth Circuit. On remand, the bankruptcy court upheld Ms. Ybarra's exemption claim

and gave her the option of accepting the $17,500 settlement amount from Rockwell or proceeding with her lawsuit against Rockwell in state court. Id. She chose to proceed with her lawsuit.

Thereafter, Ms. Ybarra persuaded the state court to set aside its dismissal order, and the case proceeded on Rockwell's motion for summary judgment. Id. Summary judgment ultimately was granted in Rockwell's favor. Rockwell then moved for an award of fees and costs under California law and was awarded $456,884.03 against Ms. Ybarra. Id. at 1020-21.

Ms. Ybarra previously had received her discharge in bankruptcy in May 1998. Rockwell filed a motion in the bankruptcy court for leave to enforce the state court's award of fees and costs. The bankruptcy court granted Rockwell's motion to the extent of $159,030.78, the total amount of fees and costs incurred by Rockwell after Ms. Ybarra filed her bankruptcy petition. Id. at 1021. Ms. Ybarra appealed to the Bankruptcy Appellate Panel, which reversed, "holding that the entire fee and cost award was discharged in [Ms.] Ybarra's bankruptcy." Id.

On further appeal, the Ninth Circuit reversed the Bankruptcy Appellate Panel, citing Siegel, for its holding that "post-petition attorney fee awards are not discharged where post-petition, the debtor voluntarily 'pursue[d] a whole new course of litigation,' commenced litigation, or 'return[ed] to the fray' voluntarily." Id. at 1024 (quoting Siegel, 143 F.3d at 533-34).

> Whether attorney fees and costs incurred through the continued prosecution of litigation initiated pre-petition may be discharged depends on whether the debtor has taken affirmative post-petition action to litigate a

> prepetition claim and has thereby risked the liability of these litigation expenses.

In re Ybarra, 424 F.3d at 1026.

Both Mr. Taggart and the Respondents have cited In re Ybarra to me and to the Circuit Court as setting forth the relevant legal standard to consider whether the Respondents violated the discharge injunction of § 524(a)(2) in seeking a judgment against Mr. Taggart in the Circuit Court Litigation, including an award of attorney's fees and costs. Based on the record before it, and specifically noting the application of In re Ybarra, the Circuit Court determined that an award of post-petition attorney's fees against Mr. Taggart was not barred by the discharge injunction, citing primarily Mr. Taggart' s never having abandoned his counterclaim for attorney's fees in the Circuit Court Litigation. See Letter Opinion, Exhibit Q, at pp. 1-2.

Injunctions issuing from the core jurisdictional authority of the bankruptcy court are not subject to collateral attack in other courts. Gruntz v. County of Los Angeles (In re Gruntz), 202 F.3d 1074, 1082 (9th Cir. en Banc 2000) (citing Celotex Corp. v. Edwards, 514 U.S. 300, 313 (1995)). The discharge injunction of § 524(a)(2) is such an injunction.

However, the Ninth Circuit further has held that a state court is not divested of jurisdiction "to determine the applicability of a discharge order when discharge in bankruptcy is raised as a defense to a state cause of action filed in a state court . . . ." McGhan v. Rutz (In re McGhan), 288 F.3d 1172, 1180 (9th Cir. 2022). Accordingly, a state court, such as the Circuit Court in this case, has concurrent jurisdiction with this court to interpret the bankruptcy court's discharge orders, but it has no authority to modify them. See In re McGhan, 288 F.3d at 1179-80.

In Gruntz, where the automatic stay injunction of § 362 was considered, the Ninth Circuit stated that, "even assuming that the states had concurrent jurisdiction, their judgment would have to defer to the plenary power vested in the federal courts over bankruptcy proceedings." In re Gruntz, 202 F.3d at 1083. The Ninth Circuit applied the same principle to alleged violations of the discharge injunction of § 524 in In re McGhan. Accordingly, neither issue preclusion nor the Supreme Court's Rooker-Feldman doctrine preclude my review of the Circuit Court's findings and conclusions with respect to the scope and application of the discharge injunction regarding the Respondents' pursuit of the Judgment and an award of attorney's fees and costs against Mr. Taggart in the continued Circuit Court Litigation. See In re McGhan, 288 F.3d at 1181; In re Gruntz, 202 F.3d at 1083-84. "In short, the state court has jurisdiction to construe the bankruptcy discharge correctly, but not incorrectly." Pavelich v. McCormick Barstow, Sheppard, Wayte & Carruth, LLP (In re Pavelich), 229 B.R. 777, 784 (9th Cir. BAP 1999). See Huse v. Huse-Sporsem, A.S. (In re Birting Fisheries, Inc.), 300 B.R. 489, 500 (9th Cir. BAP 2003).

What the foregoing authorities do not make clear is, in circumstances where the state court has applied the correct legal authority in interpreting this court's discharge order, what standard of review applies to the state court's fact findings. Ordinarily, the standard for review of a trial court's fact findings is "clear error." SEC v. Coldicutt, 258 F.3d 939, 941 (9th Cir. 2001); Clear Channel Outdoor, Inc. v. Knupfer (In re PW, LLC), 391 B.R. 25, 32 (9th Cir. BAP 2008). There are important reasons behind that standard.

> The rationale for deference to the original finder of fact is not limited to the superiority

> of the trial judge's position to make determinations of credibility [although that superiority of position is important in itself]. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. . . . As the court has stated in a different context, the trial on the merits should be "the 'main event' . . . rather than a 'tryout on the road.'" Wainwright v. Sykes, 433 U.S. 72, 90 . . . (1977). For these reasons, review of factual findings under the clearly-erroneous standard - with its deference to the trier of fact - is the rule, not the exception.

Anderson v. City of Bessemer City, 470 U.S. 564, 574-75 (1985) (emphasis in original).

"A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948). "This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently." Anderson v. City of Bessemer City, 470 U.S. at 573.

In this case, after citing In re Ybarra, the Circuit Court found that it was appropriate to award postpetition attorney's fees against Mr. Taggart as an offset to the purchase price for his member interest in SPBC because Mr. Taggart had never abandoned his own

counterclaim for attorney's fees in the Circuit Court Litigation. See Letter Opinion, Exhibit Q, at pp. 1-2. At oral argument on the Petition, Mr. Brown reminded the Circuit Court that Mr Taggart had moved for a protective order in the Circuit Court Litigation postdischarge; that he had filed a motion to dismiss postdischarge, without moving for dismissal of his counterclaim for attorney's fees; and that he had claimed the potential award of attorney's fees in the Circuit Court Litigation as an asset in his bankruptcy. See Exhibit R, at p. 3 (pp. 9-11 of the hearing transcript). In addition, the Circuit Court presided at the Trial and thus had the opportunity first-hand to consider whether Mr. Taggart's interests were represented at the Trial. I do not have a complete transcript of the Trial to review. See Exhibit 13.

In these circumstances, I cannot conclude that the Circuit Court clearly erred in determining that the Respondents did not violate Mr. Taggart' s discharge injunction under § 524 (a)(2) in seeking a judgment and an award of offsetting, postpetition attorney's fees in the Circuit Court Litigation.

If the standard of review is de novo, my task is more complicated, but I ultimately likewise conclude that it is not appropriate to disturb the Circuit Court's findings and conclusions and further determine that Mr. Taggart's Contempt Motion should be denied for the following reasons.

Deciding the Contempt Motion presents mixed questions of law and fact. Review of "mixed questions" of law and fact requires consideration of legal principles and the exercise of judgment about the values underlying those legal principles. Consequently, review is de novo. Wolkowitz v. Beverly (In re Beverly), 374 B.R. 221, 230 (9th Cir. BAP 2007) (citing Murray v.

Bammer (In re Bammer), 131 F.3d 788, 791-92 (9th Cir. 1997). In re Beverly and In re Bammer involved determinations regarding, respectively, a debtor's entitlement to a general discharge and to the dischargeability of a particular debt. This case involves yet another determination to be made with respect to the bankruptcy discharge: the application of the injunction arising upon its entry. Accordingly, generally, a determination made pursuant to § 524(a)(2) also is a mixed question of law and fact subject to de novo review.

De novo review requires that I consider a matter anew, independent of any prior decision, as if it had not been heard before. United States v. Silverman, 861 F.2d 571, 576 (9th Cir. 1988); B-Real, LLC v. Chaussee (In re Chaussee), 399 B.R. 225, 229 (9th Cir. BAP 2008).

Setting aside the Judgment and the Letter Opinion of the Circuit Court, the record reflects the following as to Mr. Taggart's participation in the Circuit Court Lawsuit postdischarge:

When Mr. Brown subpoenaed Mr. Taggart for a second deposition in the Circuit Court Lawsuit, Mr. Taggart had Mr. Berman file a motion for a protective order, requesting that the subpoena be quashed and further requesting attorney's fees. One day before the Trial, Mr. Berman filed a motion to dismiss Mr. Taggart from the Circuit Court Lawsuit in Mr. Taggart's behalf, without offering to dismiss Mr. Taggart's counterclaim for attorney's fees. That motion was argued on the first day of Trial, with Mr. Brown arguing that Mr. Taggart was a necessary party with regard to SPBC's expulsion claim. While recognizing that no money judgment would be entered against Mr. Taggart in light of his bankruptcy discharge, the Circuit

Court denied the motion to dismiss, and the Trial proceeded. Mr. Berman renewed his motion to dismiss in behalf of Mr. Taggart orally at the end of the Trial. Mr. Taggart did not appear or testify at the Trial.

Following the Trial, Mr. Berman filed the Objection to Judgment as "attorney for BT of Sherwood LLC and John Berman," but Mr. Taggart testified that Mr. Berman prepared the Objection to Judgment, in part, for him. A substantial portion of the Objection to Judgment, raises and argues objections in behalf of Mr. Taggart. At the Judgment Hearing, Mr. Berman told the Circuit Court that Mr. Taggart consented to what Mr. Berman was arguing, and again, much of Mr. Berman's argument focused on Mr. Taggart's issues. Mr. Taggart also appeared at the Judgment Hearing and argued before the Circuit Court. After the Judgment was entered, Mr. Taggart appealed it. He testified that he was representing himself in the appeal, but Mr. Berman had helped him in preparing his Notice of Appeal.

At the Hearing, Mr. Taggart testified that the Circuit Court Lawsuit had precipitated his personal bankruptcy filing. He also testified that when he filed for bankruptcy protection, he wanted to be finished with SPBC, he wanted to be freed from his connections with Mr. Jehnke and Mr. Emmert, and he had no money to fund further participation in the Circuit Court Lawsuit. In his bankruptcy schedules, he did not schedule any interest in SPBC or BT, but he did include a potential attorney's fee award on his counterclaim in the Circuit Court Lawsuit as an asset.

The foregoing presents a very mixed record. Individually, I am not sure that any of the actions of Mr. Taggart on his own or through Mr. Berman as outlined above would establish that Mr. Taggart renewed

active participation in the Circuit Court Lawsuit post-discharge. However, collectively, particularly from the point where the Circuit Court determined that Mr. Taggart's attempted transfer of his member interest in SPBC was ineffective and that he could be expelled from SPBC, I find on de novo review that Mr. Taggart reengaged in the Circuit Court Lawsuit, effectively "reentering the fray" for In re Ybarra purposes. As noted above, the burden of proof to prevail on a motion for contempt is clear and convincing evidence, and I further find that Mr. Taggart has not met that burden.

Conclusion

To recapitulate: 1) In light of the Circuit Court's application of the correct legal standard, citing In re Ybarra, if I review the Circuit Court's fact findings for clear error, I conclude that the Circuit Court did not clearly err in determining that it was appropriate to grant an offsetting award of postpetition attorney's fees against Mr. Taggart in the Circuit Court Lawsuit. 2) If my review is de novo, I find, based on the record before me, that at some point postdischarge, Mr. Taggart reengaged in the Circuit Court Lawsuit, and he did not meet his burden of proof to establish by clear and convincing evidence that the Respondents willfully violated the discharge injunction provided for in § 524(a)(2).

Based on the foregoing findings of fact and conclusions of law, I will deny Mr. Taggart's Contempt Motion. Mr. Smith or Mr. Streinz should prepare and submit an order denying the Contempt Motion within ten (10) days following the date of entry of this Memorandum Opinion.

No. 18-489

In the Supreme Court of the United States

BRADLEY WESTON TAGGART, PETITIONER

v.

SHELLEY A. LORENZEN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

JOHN M. BERMAN
7175 SW Beveland St., Ste. 210
Tigard, OR 97223

DANIEL L. GEYSER
Counsel of Record
GEYSER P.C.
One Energy Square
4925 Greenville Ave., Ste. 200
Dallas, TX 75206
(214) 800-2660
daniel.geyser@geyserpc.com

TABLE OF CONTENTS

Page

Reply Brief 11

A. There is a clear and intractable conflict 1

B. The question presented is important and recurring 8

C. This case is a perfect vehicle 8

D. The decision below is incorrect 10

Conclusion 11

TABLE OF AUTHORITIES

Cases:

Alderwoods Group, Inc. v. *Garcia*, 682 F.3d 958 (11th Cir. 2015) 4

Bruce, In re, No. 8:15-AP-01028, 2018 WL 3424581 (Bankr. C.D. Cal. July 12, 2018) 3

Everly, In re, 346 B.R. 791 (B.A.P. 8th Cir. 2006) 7

Hardy, In re, 97 F.3d 1384 (11th Cir. 1996) ..... *passim*

Howard Johnson Co. v. *Khimani*, 892 F.2d 1512 (11th Cir. 1990) 4

IRS v. *Murphy*, 892 F.3d 29 (1st Cir. 2018) 1, 5, 6

Joseph, In re, 584 B.R. 696 (Bankr. E.D. Ky. 2018) 7

Jove Eng'g, Inc. v. *IRS*, 92 F.3d 1539 (11th Cir. 1996) 11

McComb v. *Jacksonville Paper Co.*, 336 U.S. 187 (1949) 10, 11

McLean, In re, 794 F.3d 1313 (11th Cir. 2015) 4

Pratt, In re, 462 F.3d 14 (1st Cir. 2006) 2

Schwarz, In re, No. 15-44-8, 2016 WL 7413478 (Bankr. E.D.N.C. Dec. 22, 2016) 7

Statutes:

Bankruptcy Code, 11 U.S.C. 101-1532 ..... *passim*

11 U.S.C. 105 ..... *passim*

Page

Statutes—continued:

11 U.S.C. 362(k) 11
11 U.S.C. 524(a)(1) 3, 10
11 U.S.C. 524(a)(2) ..... *passim*
26 U.S.C. 7433(e) 4, 6

Miscellaneous:

2 Law of Debtors & Creditors (Nov. 2018 update) 1
Rutter Group, 22-B Cal. Practice Guide: Bankruptcy (Dec. 2018 update) 1

A. There Is A Clear And Intractable Conflict

1. As the petition established, the circuit conflict is clear, undeniable, and entrenched. Pet. 11-23. Respondents suggest the conflict is not real, but their arguments are not credible. The Ninth Circuit squarely held that "good faith" precludes liability for discharge violations; multiple circuits (and dozens of lower courts) have reached the opposite conclusion, declaring "subjective" beliefs irrelevant. Pet. 11-19.

This stark disagreement turns directly on each side's view of the controlling "rule of law." Pet. App. 12a. The Ninth Circuit acknowledged its "tension" with other circuits, but still found itself "b[ound]" by circuit authority. Pet. App. 13a & n.5 (contrasting *In re Hardy*, 97 F.3d 1384, 1390 (11th Cir. 1996)).[1] The First Circuit reaffirmed its contrary position *after* the decision in this case—with a dissent flagging the obvious conflict. See *IRS* v. *Murphy*, 892 F.3d 29, 38-40 (1st Cir. 2018); see also *id.* at 47 n.12 (Lynch, J., dissenting) (invoking the decision below in declaring "no consensus" in "the § 524 discharge injunction context"). And the same obvious split has already been recognized by multiple judges, experts, and treatises. Pet. 3 & n.1; see Rutter Group, 22-B *Cal. Practice Guide: Bankruptcy* ¶ 22:111.3 (Dec. 2018 update) (citing "disagree[ment]" with the Ninth Circuit); 2 *Law of Debtors & Creditors* § 15:4 n.7 (Nov. 2018 update) ("Courts have not agreed on whether a creditor's good faith may be a defense to a discharge injunction violation."). All of these judges and neutral commentators are not somehow

[1] Respondents quibble that the Ninth Circuit actually cited a *different* case that *quoted* the key holding from *Hardy*. Opp. 16. Yet the panel attributed that language directly to the Eleventh Circuit, and the embedded citation obviously had no effect on *Hardy*'s plain meaning. Neither the panel nor respondents could reconcile *Hardy*'s unambiguous holding with the Ninth Circuit's conflicting legal standard.

confused; under any fair reading, the circuits are intractably divided.

2. According to respondents, however, all of these courts and experts are simply wrong. Respondents, of course, have no actual support for their unique view. They could not identify a single judge, court, expert, or academic explaining away the conflict or declaring that courts uniformly accept "good faith" as precluding liability for discharge violations.

a. Starting broadly, respondents assert that the conflicting decisions "construe[d] different Code provisions containing materially different statutory language." Opp. 13. This is perplexing. Each key decision asked whether a violation of Section 524 was sanctionable under Section 105. *E.g.*, *In re Pratt*, 462 F.3d 14, 17, 19 (1st Cir. 2006). Those are the identical provisions at issue here, and the question turns directly on the controlling legal standard. The Ninth Circuit says that the creditor's state of mind is dispositive, and the other courts hold that it is irrelevant. That conflict plainly warrants the Court's review.

b. Respondents next try to avoid the square conflict with *Hardy*. Opp. 14-16. But *Hardy* resolved the identical question presented here in the opposite way. According to the Ninth Circuit, a creditor's "good faith belief * * * precludes a finding of contempt." Pet. App. 12a. But according to *Hardy*, a creditor's good faith is *irrelevant*: "'the focus of the court's inquiry * * * is not on the subjective beliefs or intent of the alleged contemnors in complying with the order, but whether in fact their conduct complied with the order at issue.'" 97 F.3d at 1390. This is why the BAP faulted the bankruptcy court for "rel[ying] on the *Hardy* test rather than using the Ninth Circuit's test" (Pet. App. 48a), and why the Ninth Circuit ultimately concluded the bankruptcy court "appl[ied] an incorrect rule

of law" (*id.* at 12a). The outcome at each stage turned on the role (or not) of "good faith."

Because the conflict is undeniable, respondents try to change the subject. They argue that *Hardy* is distinguishable on its facts because, unlike here, "the IRS did not first obtain a court order resolving the discharge question in its favor." Opp. 14. That may have some relevance under *the BAP's* alternative holding (Pet. App. 46a-47a), but it had nothing to do with *the Ninth Circuit's* operative decision. The Ninth Circuit adopted a pure legal standard that excuses discharge violations upon a showing of good faith; it did not even *recount* the BAP's logic that seeking preclearance somehow excused an attempt to collect discharged fees. Pet. App. 10a. And courts today are applying the decision below irrespective of whether the creditor sought preclearance. *E.g.*, *In re Bruce*, No. 8:15-AP-01028, 2018 WL 3424581, at *5 (Bankr. C.D. Cal. July 12, 2018).[2]

Respondents may wish to rewrite the Ninth Circuit's actual holding, but that holding is clear: respondents did not prevail because they sought preclearance from the state court (a dubious proposition anyway). Respondents prevailed because, unlike *Hardy*, the Ninth Circuit holds

---

[2] In any event, respondents simply ignore that they acted without preclearance *from the bankruptcy court*, which is the only court that actually matters. The state court's order was "void[]" (11 U.S.C. 524(a)(1)), and respondents were wrong to impose real costs on petitioner by forcing him to resist the imposition of discharged fees in state litigation. *E.g.*, *In re Fina*, 550 F. App'x 150, 153-155 (4th Cir. 2014) (per curiam); *In re Martin*, 474 B.R. 789, *10 (B.A.P. 6th Cir. 2012) (unpublished). At some level, even the BAP understood the flaws in its (alternative) position. Pet. App. 47a-48a & n.13.

that a "good faith belief"—whatever its source—"precludes a finding of contempt." Pet. App. 12a.[3]

Respondents also argue that *Hardy*'s holding has been "abrogated" (Opp. 2), as the creditor there was the IRS, and Congress later enacted legislation providing for specific sanctions against the government. Opp. 15 (citing 26 U.S.C. 7433(e)). This is baseless.

Hardy announced the legal standard in the Eleventh Circuit for discharge violations under Section 105. Section 7433(e) may have carved out a rule for *actions against the IRS*, but it did nothing to "supplant" *Hardy*'s rule for *actions against private parties*. Indeed, this is why courts, including the Eleventh Circuit, still invoke *Hardy* as establishing the controlling standard in this setting. *E.g.*, *In re McLean*, 794 F.3d 1313, 1323 (11th Cir. 2015); *Alderwoods Group, Inc.* v. *Garcia*, 682 F.3d 958, 967 n.18 (11th Cir. 2015). Put simply, even if respondents think *Hardy*'s vitality is in question, the Eleventh Circuit itself disagrees.[4]

---

[3] Respondents further suggest that the Eleventh Circuit excuses good-faith "'[c]onduct that evinces substantial, but not complete, compliance with the court order.'" Opp. 14 (quoting *Howard Johnson Co.* v. *Khimani*, 892 F.2d 1512, 1516 (11th Cir. 1990)). But respondents' failure to comply here was *total*. They sought discharged fees in state court and forced petitioner to expend significant funds defending himself from conduct that violated the Code. The fact that they acted in conjunction with a (void) state-court order—and without first seeking available review in the bankruptcy court—does not override *Hardy*'s unequivocal rule that subjective intent is irrelevant.

[4] Respondents attack petitioner for the "striking misrepresentation" that "the panel"—not Judge Bea—recognized the "ineluctable" conflict "at oral argument." Opp. 16. Yet as everyone knows, *all* statements at "oral argument" come from a single judge; panels do not speak in unison on cue, and no one thinks otherwise. The only thing "striking" here is respondents' refusal to acknowledge that one respondent (Lorenzen) conceded the circuit split. Pet. 13. In any event,

c. According to respondents, there is no conflict with the First Circuit (in *Pratt* or *Murphy*), and petitioner's contrary assertion is "puzzling." Opp. 17.

Yet puzzled or not, respondents have no answer for what *Pratt* actually said:

> We can only conclude that the [creditor's] refusal to release its valueless lien so that the vehicle could be junked—though presumably not made in bad faith—was "coercive" in its effect, and thus willfully violated the discharge injunction. [Debtors] are therefore entitled to establish and recover their compensatory damages, together with other appropriate relief under Bankruptcy Code § 105(a).

462 F.3d at 20; see also *id.* at 21 (linking the discharge standard to the automatic-stay standard, which does not excuse "good faith mistake[s]"). *Pratt* thus specifically authorized contempt sanctions under Section 105 for a discharge violation, *even where the creditors lacked "bad faith."* Respondents cannot reconcile that holding with the Ninth Circuit's decision.

In any event, whatever respondents may think of *Pratt*, the First Circuit, again, disagrees. In *Murphy*, the court read *Pratt* to mean exactly what it said: it followed earlier circuit authority to "'reject[] the proposition that a stay violation could not be actionable (*viz.*, 'willful') if the creditor had made a good faith mistake.'" *Murphy*, 892 F.3d at 40 (quoting *Pratt*, 462 F.3d at 21) ("we used the same standard to evaluate whether a violation of a discharge order was willful"). Respondents retort that *Murphy*'s observation was "unthinking" (Opp. 18), but even a

---

the fact that the conflict was flagged at argument confirms that the Ninth Circuit did not create this split by accident; it was aware of contrary authority in *Hardy*, and it nevertheless adopted the opposite rule.

quick skim through the opinion proves them wrong. The panel carefully examined decisions nationwide to discern the prevailing standards on the very question presented here. The majority was joined by Justice Souter, who is not known for his "unthinking" approach to the law. Respondents may wish to avoid a direct conflict, but their ipse dixit cannot eliminate the obvious conflict with the First Circuit.[5]

Finally, respondents repeatedly maintain that, "even if good faith were not 'a defense to liability' for contempt, it would still be possible for a contemnor 'to raise its good faith belief * * * as a means of mitigating damages.'" Opp. 21 (quoting *Murphy*, 892 F.3d at 39). Respondents inexplicably elide a key phrase: the IRS's good faith was relevant under "*preexisting provisions of the Tax Code*." 892 F.3d at 39 (emphasis added). As *Murphy* explained, those specific provisions—which have nothing to do with contempt under Section 105—let the government off the hook for attorney's fees if it acted in good faith. The Tax Code does not carry over here, and respondents err in (silently) suggesting otherwise.

d. Respondents brush aside the multitude of other decisions (including those from the Fourth Circuit and two

---

[5] Respondents say petitioner's reliance on *Murphy* is "bewildering" because the case ultimately "concerned Section 7433(e)," not Section 105. Yet the entire point of *Murphy*'s discussion was asking whether the law (both pre- and post-Section 7433) authorized "good faith" as a defense to discharge violations. See 892 F.3d at 35; Pet. 15 n.7 (so explaining). *Murphy* cited both *Pratt* and *Hardy* as establishing a clear legal rule that subjective intent is irrelevant. *Id.* at 38, 40. And *Murphy*'s dissent argued that the rule was *not* clear *partly because the Ninth Circuit's decision conflicts with the majority position*. *Id.* at 47 n.12 (Lynch, J., dissenting). There is nothing "bewildering" about confirming that the legal standard in other circuits is the opposite of the standard adopted below.

bankruptcy appellate panels) because they were unpublished. Opp. 19. But published or not, these decisions still confronted and resolved the question here by adopting the *opposite* position as the Ninth Circuit. And these decisions have still guided lower courts for years. *E.g.*, *In re Joseph*, 584 B.R. 696, 705 (Bankr. E.D. Ky. 2018) (citing *Martin*); *In re Schwarz*, No. 15-44-8, 2016 WL 7413478, at *3 (Bankr. E.D.N.C. Dec. 22, 2016) (citing *Fina*).

This Court frequently grants review to resolve even shallow conflicts over the Code. Pet. 25. This substantial body of authority establishes the obvious confusion over this vital question, and it cries out for the Court's review.

e. Respondents finally argue that the stark division is acceptable because contempt determinations are "discretionary" and "context-dependent outcomes are expected." Opp. 2. But the question presented turns on the gateway legal standard, and the Ninth Circuit held there is *no* discretion where the creditor acts in good faith. That legal determination sets a categorical rule for remedying discharge violations, and it squarely conflicts with the standard adopted by other courts nationwide. The fact that courts might have some degree of discretion downstream does not explain away the clear conflict over this significant threshold question.[6]

---

[6] Respondents maintain that other courts "routinely" excuse discharge violations due to "good faith." Opp. 22 n.8. Respondent has misread its own authority. *E.g.*, *In re Everly*, 346 B.R. 791, 797 (B.A.P. 8th Cir. 2006) (excluding sanctions where the creditor "had no actual knowledge of the debtor's bankruptcy case"). Besides, respondent has at most identified a *deeper* conflict on the question presented—while also confirming its frequent recurrence.

B. The Question Presented Is Important And Recurring

Respondents diminish the issue's importance (Opp. 19-23), but their posturing is transparent. It is not necessary to poll the nation's leading bankruptcy scholars and former judges to confirm its obvious significance. But as it happens, those very groups have done exactly that. They have confirmed the central importance of the discharge, the corresponding need to ensure a viable enforcement mechanism, and the risks and errors of the Ninth Circuit's approach. See Wedoff Amicus Br.; NCBRA Amicus Br. Respondents' mere say-so does not counteract these studied presentations.

Moreover, respondents' belief that the issue rarely arises defies common sense. Creditors can resist every discharge violation by identifying any good-faith basis for their conduct. And common sense is confirmed by shepardizing the major decisions (which will not even count unreported orders).

This question is essential to securing the debtor's fresh start and promoting the sound administration of the Code. This Court's urgent guidance is necessary.

C. This Case Is A Perfect Vehicle

Contrary to respondents' contention, this case is an optimal vehicle. The issue is outcome-determinative. The bankruptcy court adopted *Hardy*'s standard and petitioner won; the BAP and Ninth Circuit rejected *Hardy*'s standard and petitioner lost. And that legal determination was the sole basis of the decision below, as respondents concede. Opp. 2. Indeed, the Ninth Circuit did not even

recap the BAP's alternative holding, and it expressly "declined" to reach any other issues. Pet. App. 14a. There is no conceivable barrier to review.[7]

Respondents nevertheless insist this is a poor vehicle because they believe they would prevail under the BAP's alternative holding. The short answer is that the Ninth Circuit (as respondents admit) declined to decide that question; this Court can do the same. Indeed, this Court recently granted review over an identical objection. See Reply Br., *Kisor* v. *Wilkie*, No. 18-15, at 2 ("The Court routinely grants certiorari to resolve important questions that controlled the lower court's decision notwithstanding a respondent's assertion that, on remand, it may prevail for a different reason.").

The longer answer is the Ninth Circuit likely refused to embrace the BAP's alternative holding for a reason. Respondents did not obtain the necessary "approval" before forcing petitioner to engage in full-blown litigation over his discharged debt. They plowed ahead in state court without once asking the bankruptcy court for permission; rather, petitioner himself was forced to seek the bankruptcy court's protection—and the answer came after thousands of dollars were wasted defending himself on parallel tracks. Pet. App. 6a-8a.

Petitioner does not suggest that a creditor faces sanctions for seeking relief from the bankruptcy court (contra Pet. App. 46a-47a); respondents' mistake was focusing on the wrong forum. State courts have no power to rewrite Section 524 or modify the Code's discharge injunction. Where, as here, they guess wrong, their orders are "void."

---

[7] Respondents' contention that this is a "fact-bound decision" (Opp. 13) is an odd way to describe an opinion determining a dispositive "rule of law." Pet. App. 12a.

11 U.S.C. 524(a)(1). Nothing prevented respondents from lodging a proper request with the bankruptcy court.

Finally, this vehicle is especially attractive because one respondent (Lorenzen) has waived alternative grounds for affirmance. Respondents resist that conclusion, but they cannot square their position with the record. The Ninth Circuit could not have spoken more plainly on the issue: Lorenzen admitted that, "in [her] view, [intervening authority] commands resolution of whether Creditors violated the discharge against the Creditors." Pet. App. 14a n.6. And Lorenzen was explicit about the nature of the challenge she later waived. C.A. Lorenzen Supp. E.R. 4 (contesting the district court's holding that she "violated the discharge injunction").

Lorenzen may now regret that tactical choice, but it confirms the ideal presentation of the sole question now in dispute.

D. The Decision Below Is Incorrect

While respondents defend the decision below, their arguments only confirm the fundamental disagreement over this important question. Those disagreements are better suited for exploration on plenary review.

For now, three points suffice.

First, respondents could not explain how the Ninth Circuit's position is consistent with bedrock contempt principles. Pet. 27-28. This Court established the controlling framework in *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187 (1949), and there is no reason the same principles escape the bankruptcy context alone.

Second, respondents simply ignore the obvious harm and unfairness in asking good-faith debtors to pay for a good-faith creditor's mistake. Section 105 provides ample authority to redress discharge violations and restore the status quo ante—which requires compensating the debtor for the losses suffered via the creditor's error.

Finally, respondents wrongly argue that *Hardy* "unthinkingly" imported principles from the automatic-stay context into the discharge context. For one, respondents overlook that *both areas involve principles of general civil contempt*. This Court set the rules back in *McComb*, and there is no reason to depart from those rules now. For another, respondents are wrong that *Jove Eng'g, Inc.* v. *IRS*, 92 F.3d 1539 (11th Cir. 1996), was rooted to the particular language in Section 362(k). Indeed, *Jove* held that *Section 362(k) did not apply*, and thus decided the question, as here, under Section 105. 92 F.3d at 1555 (citing *McComb*). Thus, the entire foundation of respondents' argument is premised on a clear misreading of an unambiguous decision.

CONCLUSION

The petition should be granted.

Respectfully submitted.

JOHN M. BERMAN
7175 SW Beveland St., Ste. 210
Tigard, OR 97223

DANIEL L. GEYSER
Counsel of Record
GEYSER P.C.
One Energy Square
4925 Greenville Ave., Ste. 200
Dallas, TX 75206
(214) 800-2660
daniel.geyser@geyserpc.com

DECEMBER 2018

NO. 18-489

IN THE

Supreme Court of the United States

RADLEY WESTON TAGGART,

Petitioner,

v.

SHELLEY A. LORENZEN, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF THE NATIONAL CONSUMER BANKRUPTCY RIGHTS CENTER AND THE NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS AS AMICI CURIAE IN SUPPORT OF PETITIONER

TARA TWOMEY
Counsel of Record
MATTHEW J. MASON
NATIONAL CONSUMER BANKRUPTCY
RIGHTS CENTER
1501 The Alameda, Suite 200
San Jose, CA 95126
(831) 229-0256
tara.twomey@comcast.net

Dated: November 15, 2018

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. TAGGART CREATES A BROAD EXCEPTION TO THE DISCHARGE INJUNCTION THAT RENDERS IT VIRTUALLY MEANINGLESS. 4

II. IN ADDITION TO MYRIAD SCHEMES USED BY CREDITORS TO COLLECT DISCHARGED DEBT, IN THE NINTH CIRCUIT CREDITORS MAY NOW ALSO CLAIM A SUBJECTIVE GOOD FAITH BELIEF, EVEN AN UNREASONABLE ONE, THAT THE INJUNCTION DID NOT APPLY TO ITS CLAIM. 5

III. AFTER TAGGART, COURTS IN THE NINTH CIRCUIT HAVE CONSISTENTLY REVERSED BANKRUPTCY COURT DISCHARGE INJUNCTION CONTEMPT FINDINGS, WHERE THE CREDITOR INVOKED ITS SUBJECTIVE GOOD FAITH BELIEF THAT THE DISCHARGE DID NOT APPLY TO ITS CLAIM. 7

IV. IN EACH OF THESE CASES THE EVIDENCE PRESENTED WOULD SUSTAIN A DISCHARGE VIOLATION AND CONTEMPT IN THE ELEVENTH CIRCUIT UNDER HARDY. UNDER TAGGART HOWEVER, THE DEBTOR IS SADDLED WITH AN IMPOSSIBLE TASK, PROVING BY CLEAR AND CONVINCING EVIDENCE THAT A CREDITOR DID NOT SUBJECTIVELY BELIEVE ITS DEBT WAS SUBJECT TO THE DISCHARGE INJUNCTION. 14

V. THESE FOUR NINTH CIRCUIT CASES ILLUSTRATE THAT THE TAGGART TEST REWARDS IGNORANCE OF BANKRUPTCY LAW. 15

VI. THE EXACT SAME CONDUCT WHICH RESULTS IN SANCTIONS FOR A VIOLATION OF THE DISCHARGE INJUNCTION UNDER HARDY AND MURPHY IS EXCUSED UNDER TAGGART. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CONFLICT AND ESTABLISH A NATIONAL STANDARD FOR VIOLATION OF THE DISCHARGE INJUNCTION.....18

CONCLUSION.....19

APPENDIX

Order Vacating Order of Bankruptcy Court.....1a

TABLE OF AUTHORTIES

CASES:

Banco Popular, North America v. Kanning,
638 Fed. Appx. 328 (5th Cir. 2016).....3, 18

Bradley v. Fina (In re Fina),
550 Fed. Appx. 150 (4th Cir. 2014).....3, 18

Bruce v. Fazilat, (In re Bruce),
2018 WL 424581 (Bankr. N.D. Cal.
July 12, 2018) 12, 13, 16

Sherwood Park Bus. Ctr., LLC v. Taggart,
267 Or. App. 217 (Or. Ct. App. 2014) 6

Hardy v. United States (In re Hardy),
97 F.3d 1384 (11th Cir. 1996).... 2-3, 14, 18, 19

In re Chionis,
2013 WL 6840485 (B.A.P. 9th Cir.
Dec. 27, 2013) 6

In re Farley,
2016 WL 7471291 (Bankr. N.D. Cal.
Dec. 27, 2016) 4

In re Lang,
398 B.R. 1 (Bankr. N.D.
Iowa 2008).....5

In re Shaw,
2017 WL 2791663 (B.A.P. 9th Cir.
June 27, 2017) 9, 10, 16, 17

In re Taggart,
548 B.R. 275 (B.A.P. 9th Cir. 2016) ..... *passim*

Internal Revenue Serv. v. Murphy (In re Murphy),
892 F.3d 29 (1st Cir. 2018) 2, 18

Lorenzen v. Taggart (In re Taggart),
888 F.3d 438 (9th Cir. 2018) 2, 3, 4, 5

Parker v. Nelson (In re Nelson),
2016 WL 7321196 (B.A.P. 9th Cir.
Dec. 15, 2016) 8, 9, 16, 17

Zilog, Inc. v. Corning, et al.
(In re Zilog, Inc.),
450 F.3d 996 (9th Cir. 2006) 8, 10, 11

STATUTES:

11 U.S.C. 502(g) 13
11 U.S.C. 524(a)(1) 15, 16
11 U.S.C. 524(a)(2) 16
11 U.S.C. 524(c) 16
11 U.S.C. 727 15
11 U.S.C. 727(b) 16

INTEREST OF AMICUS CURIAE[1]

The National Consumer Bankruptcy Rights Center (NCBRC) is a nonprofit organization dedicated to preserving the bankruptcy rights of consumer debtors and protecting the bankruptcy system's integrity. The Bankruptcy Code grants financially distressed debtors certain rights that are critical to the bankruptcy system's operation. Yet consumer debtors with limited financial resources and minimal exposure to that system are often ill-equipped to protect their rights in the appellate process. NCBRC files amicus curiae briefs in systemically-important cases to ensure that courts have a full understanding of the applicable bankruptcy law, the case, and its implications for consumer debtors.

The National Association of Consumer Bankruptcy Attorneys (NACBA) is a nonprofit organization of over 2000 consumer bankruptcy attorneys nationwide. NACBA has members practicing in all 50 states as well as Puerto Rico and the District of Colombia. As such NACBA and its members have a special interest in the uniformity of bankruptcy practice across the United States.

NCBRC, NACBA and its membership have a vital interest in the outcome of this case. Most debtors find it hard to afford bankruptcy, let alone

---

[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than NCBRC, NACBA, its members, and its counsel made any monetary contribution toward the preparation or submission of this brief. Both Petitioner and Respondent have consented to the filing of this brief, and letters of consent accompany the brief.

defend against collection of discharged debts. Notwithstanding the discharge injunction, creditors frequently attempt to collect on their discharged debt, and they have advanced creative theories to justify those collection attempts.

However, debtors and creditors alike need to understand the extensive scope of the discharge. That is best accomplished with a straightforward and easily understandable test that draws a bright line focused on creditor conduct. If the creditor has notice of the bankruptcy and intended its actions, then attempts to collect on a pre-petition, discharged debt violate the discharge injunction. However, the test adopted by the Ninth Circuit directly conflicts with two other Courts of Appeal and focuses not on creditor conduct, but on the subjective beliefs of the creditor when it admittedly tried to collect on a discharged debt. The result is that in the Ninth Circuit, but not in other circuits, the simple discharge injunction is now expensive and complicated to enforce given the exception created in *Lorenzen v. Taggart* (*In re Taggart*), 888 F.3d 438 (9th Cir. 2018).

SUMMARY OF ARGUMENT

NCBRC and NACBA agree with the Debtor-Petitioner that certiorari should be granted to resolve a conflict in the circuits. Multiple circuits and lower courts have followed a decades old rule that a creditor who has knowledge of a bankruptcy and attempts to collect a discharged debt, violates the discharge injunction. There is no good faith exception. *Internal Revenue Serv. v. Murphy (In re Murphy)*, 892 F.3d 29 (1st Cir. 2018) (interpreting discharge injunction as applied to the IRS); *Hardy v.*

United States (*In re Hardy*), 97 F.3d 1384, 1390 (11th Cir. 1996). *See also Banco Popular, North America v. Kanning*, 638 Fed. Appx. 328, 342 (5th Cir. 2016) (describing test for evaluating discharge violation and citing *Hardy*); *Bradley v. Fina (In re Fina)*, 550 Fed. Appx. 150, 145-55 (4th Cir. 2014) (citing *Hardy* and concluding subjective belief or intent not relevant to inquiry). In *Taggart* the Ninth Circuit departed from the above test and held that a creditor's "good faith" is sufficient to excuse a discharge violation, "even if the creditor's belief is unreasonable." This conflict, if allowed to continue, imposes great costs upon a bankruptcy system as well as undermining the efficacy of the bankruptcy discharge. *Taggart* requires an evidentiary hearing in every discharge violation case where the creditor claims it acted in "good faith" albeit subjectively and unreasonably, in trying to collect on a discharged debt. No such requirement exists in other circuits and for decades that requirement did not exist in the Ninth Circuit. The *Taggart* test further increases costs by encouraging creditors to "take a chance" on collecting discharged debt knowing they can evade sanctions for their behavior by claiming "good faith." Finally, *Taggart* shifts the costs of discharge violations from the culpable creditor to the debtor. It places the debtor in the unenviable position of having to defend his or her discharge, knowing that a creditor's simple declaration of good faith will not only force an evidentiary hearing, but one that sets a very high bar for the debtor to prevail, even where the discharge violation is obvious.

The Court should grant the Petition for Writ of Certiorari, resolve the conflict in the circuits, and adopt the *Hardy* test for violation of the discharge

injunction. That test is straightforward, easy to apply, and contains no good faith exception. It preserves and protects the discharge injunction that is at the foundation of bankruptcy law.

ARGUMENT

I. *TAGGART* CREATES A BROAD EXCEPTION TO THE DISCHARGE INJUNCTION THAT RENDERS IT VIRTUALLY MEANINGLESS.

Lorenzen v. Taggart (*In re Taggart*), 888 F.3d 438 (9th Cir. 2018), holds that a creditor does not violate the discharge injunction if the creditor had a good faith belief, even if unreasonable, that the discharge injunction did not apply to its act or action to collect on a discharged debt against the debtor.

To prove a discharge violation under *Taggart*, the debtor must show by clear and convincing evidence that the "... alleged contemnor was aware of the discharge injunction and aware that it applied to his or her claim. Whether a party is aware that the discharge injunction is applicable to his or her claim is a fact-based inquiry which implicates a party's subjective belief, even an unreasonable one." *In re Taggart*, 548 B.R. 275, 288 (B.A.P. 9th Cir. 2016); *In re Farley*, 2016 WL 7471291, *3 (Bankr. N.D. Cal. Dec. 27, 2016).

Taggart has created a discharge injunction test that turns on subjective motivation and not the objective acts of the creditor. The Ninth Circuit then places the burden of proof on the debtor to show by clear and convincing evidence that the creditor (1) knew the discharge injunction was applicable and (2) intended the action which violated the injunction. The debtor must prove that the creditor actually

knew the injunction applied to the creditor's claim. Furthermore, a creditor's subjective good faith belief, even if unreasonable, that the discharge injunction did not apply to its claim, is a complete defense to a discharge injunction violation. *Lorenzen v. Taggart*, 888 F.3d at 444.

Under *Taggart* a creditor can ignore the discharge injunction, start collection activity on a discharged debt, and then when challenged, demand an evidentiary hearing forcing a debtor to disprove the creditor's "subjective intent." Given that a creditor can assert its subjective intent as a complete defense, articulation by the creditor of any plausible scheme or argument allows a creditor to ignore the discharge injunction without risk of sanctions.

II. IN ADDITION TO MYRIAD SCHEMES USED BY CREDITORS TO COLLECT DISCHARGED DEBT, IN THE NINTH CIRCUIT CREDITORS MAY NOW ALSO CLAIM A SUBJECTIVE GOOD FAITH BELIEF, EVEN AN UNREASONABLE ONE, THAT THE INJUNCTION DID NOT APPLY TO ITS CLAIM.

As noted in *In re Lang*, 398 B.R. 1, 4 (Bankr. N.D. Iowa 2008), creditors have a myriad of theories, which are, at best, "superficially rationalized schemes intended and actually work to extort payment of a discharged debt."

Taggart provides a roadmap to how to successfully extort payment of a discharged debt. All that a creditor must do is submit an affidavit or testify that the creditor believed that the injunction did not apply to its debt. The creditor is not required to justify the belief. "Subjective self-serving testimony" is sufficient to establish "good faith"

unless undisputed facts showed otherwise. *Taggart I, supra*, 548 B.R. at 288.

Such self-serving testimony precludes contempt sanctions:

> "... whenever the alleged contemnor testifies that, for whatever reason, he or she did not subjectively believe that the discharge applied to his or her claim, no matter how misguided or unreasonable that belief might have been."

In re Chionis, 2013 WL 6840485, *8 (B.A.P. 9th Cir. Dec. 27, 2013). And as noted below, Ninth Circuit courts have embraced the literal application of a subjective, good faith test which "seemingly would render the bankruptcy discharge all but toothless." *Chionis*, 2013 WL 6840485 at *8.

Taggart involves such a "superficially rationalized scheme" known as "returning to the fray." The creditors forced Taggart to defend himself in post-petition proceedings concerning a pre-petition contract and then claimed he "returned to the fray" and in so doing, waived the discharge as to the creditors' claim for attorney fees under the pre-petition agreement. While the creditors were able to persuade the trial court and the bankruptcy court that Taggart had "returned to the fray," both the Oregon Court of Appeals in *Sherwood Park Bus. Ctr., LLC v. Taggart*, 267 Or. App. 217, 230 (Or. Ct. App. 2014) and the District Court in this case found that Taggart's actions were insufficient to constitute a "return to the fray."

Yet once that theory of liability failed, the Ninth Circuit agreed that the creditors' subjective,

good faith belief that the discharge injunction did not apply to their claim, excused the creditor's violation of the discharge injunction. It ruled so even though the creditors failed to get a final determination through appeal of the validity of the "returning to the fray" theory before trying to collect on the discharged debt.

III. AFTER *TAGGART*, COURTS IN THE NINTH CIRCUIT HAVE CONSISTENTLY REVERSED BANKRUPTCY COURT DISCHARGE INJUNCTION CONTEMPT FINDINGS, WHERE THE CREDITOR INVOKED ITS SUBJECTIVE GOOD FAITH BELIEF THAT THE DISCHARGE DID NOT APPLY TO ITS CLAIM.

Taggart ruled as a matter of law that Taggart's creditors held a subjective belief the discharge did not apply to their claim. That subjective belief excused the creditor from its violation of the discharge injunction. Relying on the Bankruptcy Appellate Panel (BAP) decision in *Taggart I*, the Court found that the creditor's good faith belief was not in question. As a result, Taggart was forced to bear the costs of defending his bankruptcy discharge, which exceeded $105,000.00 in reasonable attorney fees.[2]

In subsequent cases Ninth Circuit courts have consistently reversed bankruptcy courts who imposed sanctions for a discharge violation, if a

---

[2] Taggart's attorney fees and costs totaled $105,000.00 through the bankruptcy court evidentiary hearing. By that time Taggart had been forced to litigate in state and federal court, at the trial and appellate level. It does not include the attorney fees and costs in *Taggart I* and the instant case.

creditor raised its subjective intent to preclude liability. Four examples stand out.

The first example is *Parker v. Nelson (In re Nelson)*, 2016 WL 7321196 (B.A.P. 9th Cir. Dec. 15, 2016). Citing to *Taggart I* and *Zilog, Inc. v. Corning, et al. (In re Zilog, Inc.)*, 450 F.3d 996 (9th Cir. 2006), the BAP reversed the bankruptcy court's order holding the debtor's former attorney (Parker) in contempt for violating the discharge injunction. In *Nelson,* Parker represented the debtor with respect to pre-petition accident claims. He was terminated from representing the debtor, and he was listed as a creditor on the bankruptcy petition and mailing matrix at the correct address.

After the petition was filed, but before the discharge Parker asserted an attorney's lien of $5,000 against the proceeds of any settlement. Parker continued to assert the amount was owed after the debtor received her discharge. On two occasions the debtor's current attorney sent letters to Parker putting him on notice that the asserted attorney lien violated the discharge injunction. Parker never responded to the two letters and debtor's attorney filed a motion for contempt for violation of the discharge injunction and to declare that the attorney's liens were void. Parker did not timely appear at the hearing and the motion was granted. The debtor was awarded attorney fees and costs in the amount of $2,049.00 for having to file the motion for contempt. No evidentiary hearing was held.

On appeal the BAP reversed the bankruptcy court order and remanded the case for an evidentiary hearing under the two-part test from *Zilog,* which was followed in *Taggart.*

A second hearing was held and once again Parker was found in contempt. The bankruptcy court found that Parker had actual knowledge of the discharge injunction in 2013 and still continued to assert his lien in violation of the discharge injunction for two years thereafter. The bankruptcy court awarded the debtor costs and attorney fees in the amount of $17,887.50.

On appeal for a second time, the BAP once again reversed the bankruptcy court. On review the BAP found it was sufficient for Parker to assert the defense that he did not know that the discharge injunction applied to his claims. As the dissent remarked "Parker avoids a finding of contempt simply by testifying (credibly) that he did not subjectively believe that the discharge applied to his attorney fee claims, no matter how misguided or unreasonable his belief might have been." *Nelson,* 2016 WL 7321196 at *11.

The second case is *In re Shaw,* 2017 WL 2791663 (B.A.P. 9th Cir. June 27, 2017). *Shaw* also reversed the bankruptcy court for failure of the debtor to prove by clear and convincing evidence that the creditor knew the legal theories the creditor asserted in post-discharge collection activity violated the discharge injunction.

In *Shaw* the creditor, Rogerson, sued the debtor Shaw in state court seeking to recover over $350,000 for Shaw's failure to make payments on a promissory note. *Id.* at *1. Shortly after the suit Shaw filed Chapter 7 bankruptcy, which stayed the state court action. Rogerson was listed both as a secured and unsecured creditor. Rogerson did not object to the discharge of her claims. Shaw received

his bankruptcy discharge in December 2014. Rogerson admitted receiving notice of the discharge.

Later in 2015, Rogerson amended her state court claim. *Id.* at *2. Her claims focused on an LLC, which Shaw formed after the promissory note had been executed and which was dissolved after Shaw's bankruptcy. Rogerson alleged that the LLC was liable for the promissory note debt and that Shaw remained personally liable on the discharged debt as the successor in interest to the LLC. That is, Rogerson sought to hold Shaw personally liable for the discharged debt in state court under a different theory of liability.

Shaw filed a motion in bankruptcy court to enforce his discharge. *Id.* at 3. The bankruptcy court rejected Rogerson's defenses and found that she had willfully violated the discharge injunction. She was aware of the discharge order. She had sued him on exactly the same debt that had been discharged. According to the bankruptcy court, the state court claims were merely an artifice to reimpose individual liability on Shaw for discharged debts. The court awarded Shaw attorney fees and costs in excess of $33,000.00.

The BAP reversed, finding that even though the bankruptcy court expressly cited the *Zilog/Taggart* test in making its determination, the court did not conduct an evidentiary hearing. *Id.* at *6. Furthermore, on the record before the court, Shaw had not proven that Rogerson subjectively knew that the legal theories of recovery she asserted violated the discharge injunction. The BAP remanded the case to the bankruptcy court to

conduct a hearing in accordance with *Zilog*. *Id.* at *6.

The third case is *Morning Star Company v. Benech (In re Benech)*, 17-CV-05100-LHK (N.D. Cal., Order Vacating Order of Bankruptcy Court, July 25, 2018) (Appendix 1a). In *Benech* the district court reversed a bankruptcy court contempt finding based on creditor's counsel "mistake of law." In 2009 Benech, the debtor, signed a promissory note secured by a deed of trust on his San Francisco property. In October 2013, Benech filed Chapter 7 bankruptcy and received his discharge in March 2014, which eliminated his personal liability on the note.

In 2015, in exchange for a 60-day delay in the foreclosure of his San Francisco property, Benech executed an agreement that purportedly reaffirmed his obligation to pay the creditor the full amount of his already discharged promissory note plus interest. After the property was sold, the creditor sued the debtor in state court on the balance of the promissory note after credit of the sale proceeds.

Benech's attorney informed the creditor that the underlying debt had been discharged in bankruptcy and not reaffirmed in the manner required by the Bankruptcy Code. When the creditor continued to pursue the debtor, Benech filed a Motion for Contempt in the bankruptcy court. At the hearing, counsel for the creditor revealed that he did not understand the basis for violating the discharge injunction. The court explained to him that the act of trying to collect on the discharged debt violated the discharge. The bankruptcy court noted that there was nothing in the pleadings to suggest the creditors did not understand it was a discharged debt. He

then found the creditor in contempt and awarded Benech $19,247.74 in attorney fees and costs.

On appeal the creditor asserted that Benech did not prove by clear and convincing evidence that the creditor knew the discharge applied to its claim, because creditor's counsel believed there was no violation for entering into an improper post-petition reaffirmation agreement and then enforcing it. The district court agreed and remanded the case to the bankruptcy court for an evidentiary hearing to determine if the creditor knew the discharge applied to its claim, keeping in mind that a good faith belief, even if unreasonable, would insulate the creditor from the discharge violation.

The fourth case is *Bruce v. Fazilat, (In re Bruce)*, 2018 WL 424581 (Bankr. N.D. Cal. July 12, 2018). In *Bruce* the bankruptcy court refused to issue sanctions despite finding a discharge injunction violation because of the creditor counsel's mistake of law. *Id.* at *5.

In *Bruce* the creditor sought to evict the debtor from rental housing by bringing an unlawful detainer action. *Id.* at *1-2. Before the case came to trial the debtor filed a Chapter 7 bankruptcy petition. The creditor was listed on the schedules. While the bankruptcy was pending, the creditor cut the lock off of the electrical box, turned the power off and put a new lock on the box. Shortly thereafter, the creditor tried to break into the house to collect the money owed. Then the creditor's daughter contacted the debtor's employer while the stay was still in effect, purportedly to ask for the debtor's address so he could be sued. Within a week of the

contact the debtor was told to resign his employment or be fired. He resigned.

After the discharge, the unlawful detainer trial was held and the creditor obtained a personal judgment for over $13,000.00 against the debtor for post-petition rent and costs in violation of the discharge injunction. *Id.* at *3. At a discharge injunction hearing the bankruptcy court found that the state court judgment imposed personal liability on the debtor on a lease that had been rejected in the bankruptcy. Therefore, the creditor's claim was treated as a pre-petition claim under 11 U.S.C. 502(g) and discharged. The state court judgment was declared to be void.

The bankruptcy court ordered sanctions for violation of the stay due to the extra-judicial attempts to force the debtor out of his house and interference with his job. However, the court declined to award sanctions against the creditor for obtaining a personal judgment against the debtor on a discharged debt. Citing to *Taggart's* unreasonable good faith belief standard, the court accepted the creditor attorney's defense that he believed he had a right to sue for holdover damages and attorney fees, despite the bankruptcy discharge. "Here, there is no doubt that [creditor's attorney] had a good faith belief that he was properly bringing an action in the state court for holdover damages and attorney's fees." *Id.* at *5. The court vacated the state court judgment but found no contempt.

IV. IN EACH OF THESE CASES THE EVIDENCE PRESENTED WOULD SUSTAIN A DISCHARGE VIOLATION AND CONTEMPT IN THE ELEVENTH CIRCUIT UNDER *HARDY*. UNDER *TAGGART* HOWEVER, THE DEBTOR IS SADDLED WITH AN IMPOSSIBLE TASK, PROVING BY CLEAR AND CONVINCING EVIDENCE THAT A CREDITOR DID NOT SUBJECTIVELY BELIEVE ITS DEBT WAS SUBJECT TO THE DISCHARGE INJUNCTION.

In each of the cases cited above, including *Taggart,* the debtor proved that the debtor filed bankruptcy, the creditor's debt was listed, the creditor received notice of the bankruptcy, the debtor received a discharge, the creditor received notice of the discharge, the creditor did not object to the discharge and that the creditor then continued to personally collect against the debtor or debtor's property on a debt it knew was discharged. In each of the cases the debtor's counsel informed the creditor or its counsel that the creditor's actions were violating the discharge injunction. In each case the creditor continued its collection action.

Under *Hardy* that proof is sufficient for the court to find a violation of the discharge injunction. There is no good faith exception. 97 F.3d at 1390. Yet in the Ninth Circuit that evidence is not sufficient to find a discharge injunction violation, albeit on the very same facts. In the Ninth Circuit the debtor also has the burden of proof of showing by clear and convincing evidence that a creditor did not subjectively believe its debt was subject to the discharge injunction. The court does not explain how a debtor disproves subjective intent. The fact that a debtor notifies the creditor in writing why its debt is discharged is not sufficient. And no amount of

objective proof suffices if the creditor is not persuaded to admit liability. Apparently only a Perry Mason moment on cross-examination would suffice, where under intense questioning the creditor breaks down, admits it was all a sham and that he just wanted his money. This is an impossible task to impose on a debtor as the price for protecting his discharge.

V. THESE FOUR NINTH CIRCUIT CASES ILLUSTRATE THAT THE *TAGGART* TEST REWARDS IGNORANCE OF BANKRUPTCY LAW.

In three of the four cases appellate courts reversed bankruptcy court decisions finding a violation of the discharge injunction, after the creditor articulated that it did not believe the bankruptcy discharge applied to its claim. In the fourth case the bankruptcy court declined to award damages because the creditor's attorney convinced the court that he believed he was acting properly in bringing the collection action for a discharged debt in state court. In each of those cases the creditor's action was based on a mistaken understanding of bankruptcy law and the discharge injunction, at a fairly elementary level.

A discharge in any case under title 11 pursuant to 11 U.S.C. 524(a)(1) voids any judgment at any time obtained, to the extent that the judgment is a determination of the personal liability of the debtor. It applies to any debt discharged under section 727 whether or not the discharge of such debt is waived. A discharge under Title 11 also operates as an injunction against the commencement or continuation of an action or an act to collect or recover any such debt as a personal liability of the

debtor, whether or not the discharge is waived. 11 U.S.C. 524(a)(2).

In *Nelson*, the creditor, an attorney, claimed he did not know that his claim for pre-petition legal services was discharged in bankruptcy. *Nelson,* 2016 WL 7321196 (B.A.P. 9th Cir. Dec. 15, 2016). In *Shaw,* the creditor knew the debt was discharged. 2017 WL 2791663 (B.A.P. 9th Cir. June 27, 2017). However, the creditor claimed that pursuing the debtor under a different theory of liability would justify attempt to collect the discharged debt. The bankruptcy court found that the state court claims were merely an artifice to reimpose individual liability on Shaw for discharged debts in violation of 524(a)(2).

In *Benech,* the creditor got the debtor to execute a purported reaffirmation agreement even though the agreement met none of the requirements under 11 U.S.C 524(c) and therefore was not enforceable. *Benech*, 17-CV-05100-LHK (N.D. Cal., Order Vacating Order of Bankruptcy Court, July 25, 2018). Regardless the creditor tried to enforce the agreement by suing in state court and in doing so violated the discharge injunction.

In *Bruce*, the creditor sought to impose personal liability on the debtor on a lease that had been rejected in the bankruptcy by seeking a post-petition personal judgment against the debtor. 2018 WL 424581 (Bankr. N.D. Cal. July 12, 2018). However, the post-petition judgment that the creditor obtained based on the pre-petition lease was void under 11 U.S.C. 727(b) and a violation of sections 524(a)(1) and (a)(2). Still the debtor had to

bear the cost of resorting to the bankruptcy court to avoid the $16,216.56 judgment obtained against him.

In each of these cases the debtor had to expend large sums of money to defend the bankruptcy discharge. In *Nelson* the debtor expended over $17,000.00 in attorney fees and costs, litigated two successful motions for contempt only to have the cases reversed based on the creditor's subjective belief that his underlying claim for attorney fees was not discharged in the bankruptcy. 2016 WL 7321196, at *4. In *Shaw* the debtor expended over $33,000.00 in attorney fees to defend his discharge. 2017 WL 2791663, at *1. In *Bruce* the debtor had to expend an unknown amount of fees to obtain a bankruptcy court ruling that a $17,000.00 post-petition judgment was void, in violation of the discharge injunction. In *Benech* the debtor expended over $19,000.00 in attorney fees and costs to defend against a state court suit brought on a discharged debt. *Benech*, 17-CV-05100-LHK (N.D. Cal., Order Vacating Order of Bankruptcy Court, July 25, 2018).

None of these are particularly complicated cases. Even if an attorney was not familiar with bankruptcy law, there are many attorneys who could provide advice and counsel. In each of the cases debtor's counsel explained the basis for the discharge violation. In each of the cases the creditor ignored those warnings. And if the creditor ignored that advice, then the creditor should bear the costs incurred by the debtor instead of being rewarded.

VI. THE EXACT SAME CONDUCT WHICH RESULTS IN SANCTIONS FOR A VIOLATION OF THE DISCHARGE INJUNCTION UNDER *HARDY AND MURPHY* IS EXCUSED UNDER *TAGGART*. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CONFLICT AND ESTABLISH A NATIONAL STANDARD FOR VIOLATION OF THE DISCHARGE INJUNCTION.

Under *Hardy* and *Murphy* a creditor violates the discharge injunction if the creditor (1) had notice of the discharge injunction, and (2) intended the actions that violated the injunction. There is no good faith exception. *In re Hardy,* 97 F.3d at 1390; *Murphy, supra,* 2018 WL 2730764. *See also Banco Popular, North America v. Kanning,* 638 Fed. Appx. 328, 342 (5th Cir. 2016) (describing test for evaluating discharge violation and citing *Hardy*); *Bradley v. Fina (In re Fina),* 550 Fed. Appx. 150, 145-55 (4th Cir. 2014) (citing *Hardy* and concluding subjective belief or intent not relevant to inquiry). Under *Taggart* a subjective, even unreasonable, belief that the discharge does not apply to the creditor's claims excuses the same collection action which justifies sanctions in other circuits.

Bankruptcy is a national law. The geography of the debtor should not determine when a discharge violation occurs. And there is no dispute in the cases that the creditors are violating the discharge injunction. However, there is a dispute as to the consequence of such a violation.

Under *Taggart* that conduct is excused if the creditor can articulate a belief that the discharge injunction did not apply to its claim. *Taggart* establishes an almost impossible burden, requiring the debtor to show by clear and convincing evidence

at an evidentiary hearing that the creditor did not believe the discharge applied to its claims.

Under *Hardy* the discharge injunction is violated when a creditor seeks repayment of a discharged debt after the creditor knows that the debtor had filed bankruptcy, listed the debt and received a discharge. Those facts are easy to ascertain and capable of objective proof. Good faith is not a defense. Creditors proceed at their own risk if they try to collect on a discharged debt without having obtained a final determination that the debt was excepted from the scope of the discharge.

Simply put, *Hardy* requires creditors to take responsibility for their own acts in trying to collect on a discharged debt; *Taggart* excuses creditors from that same responsibility.

CONCLUSION

Amici NCBRC and NACBA respectfully submit that Petitioner's Petition for a Writ of Certiorari be granted and the conflict between the circuits resolved.

Respectfully submitted,

/s/ Tara Twomey

TARA TWOMEY
Counsel of Record
MATTHEW J. MASON
NATIONAL CONSUMER BANKRUPTCY RIGHTS CENTER
1501 The Alameda, Suite 200
San Jose, CA 95126
(831) 229-0256
tara.twomey@comcast.net

Dated: November 15, 2018

APPENDIX

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

THE MORNING STAR COMPANY, et al.

Appellants,

v.

ROBERT BENECH,

Appellee.

Case No. 17-CV-05100-LHK

ORDER VACATING ORDER OF BANKRUPTCY COURT

THE MORNING STAR COMPANY, et al.

Appellants,

v.

ROBERT BENECH,

Appellee.

Case No. 17-CV-07108-LHK

ORDER VACATING ORDER OF BANKRUPTCY COURT

Appellants Morning Star Company, Weintraub Tobin Chediak Coleman Grodin Law Corporation, and Chris Rufer ("Appellants") appeal the Bankruptcy Court's order finding Appellants in contempt for violating the discharge injunction of Robert Benech ("Appellee"). *Morning Star Company et al. v. Benech*, Case No. 17-CV-05100-LHK ("*Morning Star I*"). Appellants also appeal the Bankruptcy Court's subsequent order awarding Appellee $19,247.74 in attorney's fees and costs

spent as a result of Appellee's violation of the discharge injunction. *Morning Star Company et al. v. Benech*, Case No. 17-cv-07108-LHK ("*Morning Star II*").[1] Having considered the parties' submissions, the relevant law, and the record in this case, the Court VACATES both orders and REMANDS for reconsideration of the contempt finding.

I. BACKGROUND

A. Factual Background

On October 8, 2009, Appellee executed a promissory note secured by a Deed of Trust in favor of Appellant Chris Rufer ("Rufer") in the amount of $310,000 ("the Promissory Note"). *Morning Star I*, ECF No. 10 (Appellant's Amended Excerpts of Record, or "ER") at 154. To secure Appellee's obligations under the Promissory Note, a Deed of Trust was recorded against Appellee's property in San Francisco, California. *Id.* On December 31, 2010, Rufer assigned his rights and obligations under the Promissory Note and Deed of Trust to Appellant Morning Star Company ("Morning Star"). *Id.* at 155.

On April 17, 2012, Appellee entered into a Severance and Release Agreement ("Severance Agreement") with VSP Products, Inc. ("VSP") which is owned by Rufer. *Id.* at 155. Prior to the Severance Agreement, Appellee was an employee of VSP. *Id.* The Severance Agreement amended the principal owed by Appellee under the Promissory Note to $250,000. *Id.*

---

[1] The Court granted the parties' stipulation to consolidate the two appeals. *Morning Star I*, ECF No. 17; *Morning Star II*, ECF No. 5.

On December 20, 2013, Appellee filed for Chapter 7 bankruptcy, listing a $250,000 secured debt to Rufer. *Id.* at 129. On March 28, 2014, Appellee received his discharge. *Id.* at 170. Appellants do not dispute that this discharged the $250,000 Appellee owed under the Promissory Note. The bankruptcy case closed on August 15, 2014. *Id.* at 114.

On April 1, 2016, Appellee and Morning Star entered into a Promissory Note Payoff and Standstill Agreement ("Standstill Agreement"). *Id.* at 135–39 (text of the Standstill Agreement).

The Standstill Agreement obligated Appellee to pay Morning Star the entire balance of the already-discharged Promissory Note plus interest, which amounted to $345,334.59 plus an additional $51.37 of interest each day. *Id.* at 135–36. For its part, Morning Star agreed to delay its foreclosure of Appellee's San Francisco property until June 1, 2016. *Id.* at 136. The Standstill Agreement makes no mention of the bankruptcy proceedings. Appellee and Morning Star were both represented by counsel, but Appellee has since sued his former attorneys for malpractice. *Id.* at 92–95 (complaint in malpractice suit).

Appellee's sale of his San Francisco property resulted in a payment of $126,965.94 to Morning Star. *Id.* at 156. On February 15, 2017, Morning Star filed a complaint against Appellee in Superior Court for the County of Yolo that sought to enforce payment of the Promissory Note that had been discharged in bankruptcy. *Id.* at 153–58 (copy of complaint). On March 20, 2017, Appellee informed Morning Star through his current counsel that the

Promissory Note had been discharged in bankruptcy and asked Morning Star to dismiss the state court action. *Id.* at 145. Morning Star refused. *Id.* at 146–49. Instead, Morning Star filed an amended complaint that alleged Appellee had breached the Standstill Agreement instead of the Promissory Note and alleged that the Standstill Agreement was supported by separate consideration. *Id.* at 172–79.

B. Procedural History

On May 2, 2017, Appellee filed a motion to reopen his bankruptcy case in order to file a motion for damages against Morning Star for violating the discharge injunction. *Id.* at 103–04. On May 20, 2017, the Bankruptcy Court denied this motion on the grounds that the motion was unnecessary in order to bring a contempt motion. *Id.* at 104.

On June 29, 2017, Appellee filed a motion for contempt. *Id.* at 113–122 (copy of motion). On August 17, 2017, the Bankruptcy Court granted Appellee's motion and found Appellants in contempt. *Id.* at 1–3. The Bankruptcy Court, subject to further proof, awarded Appellee attorney's fees and costs incurred as a result of Appellants' violation of the discharge injunction and emotional distress damages. *Id.* at 2. The Bankruptcy Court denied an award of punitive damages. *Id.* On September 1, 2017, Appellants appealed the Bankruptcy Court's order finding Appellants in contempt. *Morning Star I*, ECF No. 1 (notice of appeal).

On December 5, 2017, the Bankruptcy Court awarded Appellee $19,247.74 in attorney's fees and costs. *Morning Star II*, ECF No. 1-2. On December 14, 2017, Appellants appealed the Bankruptcy Court's order awarding attorney's fees and costs.

Morning Star II, ECF No 1 (notice of appeal). On March 28, 2018, the Court granted the parties' stipulation to consolidate the two appeals. *Morning Star I*, ECF No. 17; *Morning Star II*, ECF No. 5.

On November 29, 2017, Appellants filed their opening brief. *Morning Star I*, ECF No. 8 ("Appellant Br."). On January 3, 2018, Appellee filed his response brief. *Morning Star I*, ECF No. 14 ("Appellee Br."). On January 17, 2018, Appellants filed their reply. *Morning Star I*, ECF No. 16 ("Reply Br.").

II. LEGAL STANDARD

A federal district court has jurisdiction to entertain an appeal from a bankruptcy court under 28 U.S.C. § 158(a), which provides: "The district courts of the United States shall have jurisdiction to hear appeals ... from final judgments, orders, and decrees[ ] of bankruptcy judges[.]" On appeal, a district court reviews a bankruptcy court's conclusions of law de novo, and the bankruptcy court's factual findings for clear error. *In re Greene*, 583 F.3d 614, 618 (9th Cir. 2009) (citing *In re Raintree Healthcare Corp.*, 431 F.3d 685, 687 (9th Cir. 2005)); *In re Salazar*, 430 F.3d 992, 994 (9th Cir. 2005); *see In re Taggart*, 548 B.R. 275, 286 (B.A.P. 9th Cir. 2016), *aff'd*, 888 F.3d 438 (9th Cir. 2018) ("*Taggart I*"). A bankruptcy court's "decision to impose contempt sanctions is reviewed for an abuse of discretion." *In re Taggart*, 888 F.3d 438, 443 (9th Cir. 2018) ("*Taggart II*").

III. DISCUSSION

The Bankruptcy Court found Appellants in contempt and awarded Appellee attorney's fees and

costs because the Bankruptcy Court found that Appellants had willfully violated the discharge injunction. Appellants argue that the Bankruptcy Court erred in finding them in contempt because they did not, in fact, violate the discharge injunction. Appellants argue in the alternative that even if they violated the discharge injunction the Bankruptcy Court misapplied the legal standard for a finding of contempt and should have conducted an evidentiary hearing. The Court rejects Appellants' initial argument, but agrees that the Bankruptcy Court misapplied the legal standard and should have conducted an evidentiary hearing.

A. Violation of the Discharge Agreement

Appellants' post-discharge contract with Appellee ("Standstill Agreement") revived debts Appellee had already discharged in bankruptcy. Appellants argue the Standstill Agreement could permissibly do this for three reasons. First, Appellants argue that the Standstill Agreement was valid because it was based on consideration separate from the debts Appellee discharged in bankruptcy. Second, Appellants argue that Appellee judicially admitted the Standstill Agreement is valid and therefore can no longer contend that the Standstill Agreement is not valid. Third, Appellants argue that Appellee forfeited any reliance on the discharge injunction because he voluntarily sought out and entered into the Standstill Agreement. None of these arguments are persuasive.

Appellants' first argument relies on distinguishing the Standstill Agreement from a reaffirmation agreement. Reaffirmation agreements are agreements "based at least 'in part' on the

discharged debt" and which therefore must comply with the requirements of 11 U.S.C. § 524(c). *In re Lopez*, 345 F.3d 701, 707 (9th Cir. 2003) (quoting § 524(c)); *see also Bobka v. Toyota Motor Credit Corp.*, 2018 WL 2382766, at *4 (S.D. Cal. May 24, 2018) (noting reaffirmation agreements "are contrary to the stated goal of a debtor receiving a fresh start" and are therefore "subject to intense judicial scrutiny and must comply with all statutory requirements" (citation omitted)). The Bankruptcy Court found that the Standstill Agreement did not comply with § 524(c)'s requirements, a finding Appellants do not dispute here. ER at 12 ("[T]o be a valid agreement it ... must ... satisfy the requirements of 524 (c). There are five requirements. None of them are satisfied and they couldn't be because it has to be entered into pre- prior to discharge.").

To avoid the Bankruptcy Court's finding, Appellants contend that the Standstill Agreement is not a reaffirmation agreement but is instead a valid post-petition agreement. Appellants suggest contracts (such as the Standstill Agreement) constitute valid post-petition agreements provided that there is "some new separate consideration for the subsequent agreement." Appellant Br. at 10. Appellants argue that they provided new consideration by agreeing to wait two months before foreclosing on Appellee's property, and that Appellee provided new consideration by agreeing to waive his claims against Chris Rufer, Morning Star, Tim Cruise and Nick Kastle. *Id.* at 10. Appellants point to *In re Heirholzer*, which found that a post-discharge contract was not a reaffirmation agreement because the creditor's "decision to forego

foreclosure represents new and sufficient consideration to support a binding post-discharge obligation." 170 B.R. 938, 941 (Bankr. N.D. Ohio 1994). Appellants also cite *In re Martin*, which found that "post-petition agreements can create an enforceable obligation." 474 B.P. 789, at *7 (B.A.P. 6th Cir. 2012).

Appellants' argument is not credible. By its terms, § 524(c) applies to "[a]n agreement between a holder of a claim and the debtor, the consideration for which, in whole *or in part*, is based on a debt that is dischargeable ... ." 11 U.S.C. § 524(c) (emphasis added). The Standstill Agreement reaffirms Appellee's debts to Appellants under an already-discharged promissory note, which is precisely why Appellants filed a lawsuit in state court to collect the balance due under the discharged promissory note. *Id.* at 153–58 (copy of state court complaint seeking to collect on discharged promissory note); Appellant Br. at 5 ("On February 15, 2017, Morning Star filed a verified complaint in Yolo County Superior Court seeking payment of the balance due."). Thus even assuming *arguendo* that Appellants' delay and Appellee's waiver were valid consideration, the Standstill Agreement would remain at least "in part" based on Appellee's reaffirmation of hundreds of thousands of dollars of previously discharged debt. Appellant Br. at 4 (noting that as part of the Standstill Agreement Appellee agreed that he still owed $345,334.59 plus interest under a note discharged in bankruptcy).

Heirholzer and *Martin* do not compel a different conclusion. To start, both decisions are out-of-circuit bankruptcy decisions which means they are not binding here. Moreover, *Heirholzer* was

premised on a finding that the post-discharge agreement was "completely separate from the initial note that was discharged in bankruptcy." 170 B.R. at 941. By contrast, the Standstill Agreement reaffirms debts owed under a promissory note that was discharged in bankruptcy. *See also In re Getzoff*, 180 B.R. 572, 575 (B.A.P. 9th Cir. 1995) (rejecting argument that, in light of *Heirholzer*, a post-petition agreement in which creditor traded an extension of a loan for debtor's promise to honor discharged debt was valid).

Furthermore, *Martin*'s statement that "post-petition agreements can create an enforceable obligation" referred to "debt that arises *after* the creditor files for bankruptcy relief ... ." 474 B.R. 789, at *7 (emphasis added). That holding is inapplicable here because Appellee's debt arose before bankruptcy. Furthermore, *Martin* affirmed a bankruptcy court's finding that a creditor was in contempt for violating the discharge injunction where the creditor sought to enforce a post-discharge agreement and relied on the same theory Appellants pursue here. *Id.* at *10 (affirming sanctions despite creditor's mistaken belief that post-petition agreement with debtor was valid because "debtor had voluntarily agreed to enter into a new contract with him"). The bottom line is that the Standstill Agreement is a reaffirmation agreement that did not comply with § 524(c)'s requirements. Thus, Appellants violated the discharge injunction.

Appellants' second argument is that Appellee has judicially admitted that the Standstill Agreement is valid and cannot now argue otherwise. Appellants' argument rests on Appellee's complaint in his malpractice suit against the attorneys who

advised him in connection with the Standstill Agreement. The complaint alleges that Appellee's erstwhile attorneys "should have advised Plaintiff that entering into the ... [Standstill] Agreement would be considered new consideration and that Plaintiff's obligations under the ... [Standstill] Agreement would therefore not be included in the discharge Plaintiff received in his bankruptcy case." Appellant Br. at 17. Appellants' theory is unpersuasive because the complaint's statement is not a judicial admission. "Judicial admissions apply only to factual statements, not statements of law." *Maloney v. Scottsdale Ins. Co.*, 256 F. App'x 29, 32 n.3 (9th Cir. 2007). A conclusion about the legal effect of a contract or a bankruptcy discharge is a statement of law, not a statement of fact.[2] Even assuming *arguendo* that some legal conclusions are binding, this statement is not one of them. The complaint is describing how the Standstill Agreement "would be considered" by others, not what the Standstill Agreement's actual legal effect is or how Appellee himself understands it. Thus, the statement does not bind Appellee to any particular view as to the Standstill Agreement's validity or invalidity.

Appellants' third argument is that Appellee cannot rely on the discharge injunction's protection because he voluntarily signed the Standstill Agreement after the discharge. Appellants rely on a

---

[2] More generally, it is a stretch for Appellants to rest their argument that the Standstill Agreement is valid on a lawsuit alleging Appellee's former lawyers committed malpractice by advising him to sign it.

strained reading of *In re Ybarra*, 424 F.3d 1018 (9th Cir. 2005), and *Siegel v. Federal Home Loan Mortgage Corp.*, 143 F.3d 525 (9th Cir. 1998). Appellants claim these cases show that a debtor cannot use a discharge injunction as a shield against contractual liability after "affirmatively seeking and obtaining the new" agreement following discharge from bankruptcy proceedings. Appellant Br. at 12.

Appellants read *Ybarra* and *Siegel* far too broadly because both decisions were concerned with the narrow issue of attorney's fees. *Siegel* "held that an award of attorney fees incurred post-petition based on a pre-petition cause of action was not discharged in bankruptcy." *Ybarra*, 424 F.3d at 1021. *Ybarra* simply "reaffirm[ed] that claims for attorney fees and costs incurred post-petition are not discharged where post-petition, the debtor voluntarily commences litigation or otherwise voluntarily 'return[s] to the fray.'" *Id.* at 1026 (quoting *Siegel*, 143 F.3d at 533–34) (second alteration in original). Neither decision states or implies that a contract reaffirming a discharged debt is somehow exempt from the discharge injunction. Moreover, even if *Ybarra* and *Siegel* could be read as Appellants suggest—and they cannot—Appellants fail to explain how this new exemption to the discharge injunction would excuse the Standstill Agreement's noncompliance with § 524(c)'s requirements for debts "based at least 'in part' on the discharged debt[s]." *Lopez*, 345 F.3d at 707.

In sum, the Court finds that the Standstill Agreement was barred by the discharge injunction. The Court now turns to whether the Bankruptcy Court's orders finding Appellants in contempt for attempting to enforce the Standstill Agreement and

awarding Appellee attorney's fees and costs were permissible.

B. Contempt Finding

A discharge under Chapter 7 of the bankruptcy code "discharges the debtor from all debts that arose before the date of the" bankruptcy petition. 11 U.S.C. § 727(b). Once issued, the discharge "operates as an injunction against the commencement or continuation of an action ... to collect, recover or offset any such debt as a personal liability of the debtor." 11 U.S.C. § 524(a)(2). A party who violates the discharge injunction can be held in contempt. *In re Zilog, Inc.*, 450 F.3d 996, 1007 (9th Cir. 2006). The party seeking contempt sanctions "must prove that the creditor (1) knew the discharge injunction was applicable and (2) intended the actions which violated the injunction." *Taggart II*, 888 F.3d at 443 (quoting *In re Bennett*, 298 F.3d 1059, 1069 (9th Cir. 2002)).

The requirement that the contemnor "(2) intended the actions which violated the injunction" is not at issue. *Taggart II*, 888 F.3d at 443.The Bankruptcy Court found that the action which violated the discharge injunction was filing the state court complaint to collect on the Standstill Agreement:

MS. OELSNER: No, I understand. No, no. I understand what you're saying and I – I have been doing this for 30 years, so I appreciate the argument you're making. But the entering into the second Standstill Agreement—

THE COURT: But that wasn't what violated the discharge. It was only when you sought to collect.

MS. OELSNER: By filing the complaint.

THE COURT: Right.

ER at 13. Appellants do not dispute that they intended to file the state court complaint. Thus, the second requirement is met because "[t]he focus is on whether the offending party's conduct violated the injunction and whether that conduct was intentional; it does not require a specific intent to violate the injunction." *In re Shaw*, 2017 WL 2791663, at *5 (B.A.P. 9th Cir. June 27, 2017); *see, e.g., In re Meints*, 2017 WL 5973319, at *7 (C.D. Cal. Jan. 4, 2017) (finding attorney's filing of a complaint warranted contempt sanctions where attorney knew of discharge injunction and intended to file complaint).

The parties' dispute instead centers on whether Appellants "(1) knew the discharge injunction was applicable" to the debts the Standstill Agreement purported to revive. *Taggart II*, 888 F.3d at 443. "This standard requires evidence showing the alleged contemnor was aware of the discharge injunction *and* aware that it applied to his or her claim." *Taggart I*, 548 B.R. at 288 (emphasis in original). If a creditor disputes that they had this knowledge, "a finding that they knew of the injunction, and thus willfully violated it, can only be made after an evidentiary hearing." *Zilog*, 450 F.3d at 1008. A creditor's "good faith belief that the discharge injunction does not apply to the creditor's claim precludes a finding of contempt, even if the

creditor's belief is unreasonable." *Taggart II*, 888 F.3d at 444.

Appellants argue that the Bankruptcy Court erred because it did not find that Appellants were aware that the discharge injunction applied to their attempt to enforce the Standstill Agreement. The Bankruptcy Court found Appellants willfully violated the discharge injunction because "as I read the pleadings, there is nothing to indicate that the respondents Morning Star and others didn't understand that this was a discharged debt." ER at 12–13 (hearing transcript). This is in one sense correct: Appellants do not meaningfully dispute that they knew the debt subject to the Standstill Agreement was discharged. However, that is only half of the inquiry because the "alleged contemnor ... [must be] aware of the discharge injunction **and** aware that it applied to his or her claim." *Shaw*, 2017 WL 2791663, at *5 (bold emphasis in original); *Taggart I*, 548 B.R. at 288 (stating same). The Bankruptcy Court overlooked the latter requirement because Appellants argued at length that the discharge injunction did not apply to the Standstill Agreement, a position which could indicate that Appellants may not believe that the discharge injunction applies to their claims. *See* ER at 97–112 (opposition to motion for contempt arguing at length that the Standstill Agreement is not subject to the discharge injunction); Appellants' Br. 8–13 (repeating similar arguments here).

To be clear, the Bankruptcy Court could certainly have found that despite Appellants' arguments, Appellants were in fact aware that the discharge injunction applied to Appellants' claims. As Appellee points out, Appellants filed a notice of

special appearance before the Bankruptcy Court, the order discharging Appellee from bankruptcy was served on Appellants, and Appellants amended their complaint in the state court suit to plead around the discharge once Appellants were informed that their initial complaint violated the discharge injunction. ER 155, 168–71, 180–81. Nonetheless, it does not appear from the record that the Bankruptcy Court found that Appellants were aware that the discharge injunction applied to Appellants' claims.

By finding only that Appellants knew of the discharge injunction, but not that Appellants were aware of the discharge injunction's applicability, the Bankruptcy Court did not apply the correct legal standard for finding Appellants in contempt. *Taggart II*, 888 F.3d at 444 ("[T]he bankruptcy court abused its discretion by applying an incorrect rule of law."). The Bankruptcy Court therefore abused its discretion. *See Perry v. Brown*, 667 F.3d 1078, 1084 (9th Cir. 2012) ("[A]n error of law constitutes an abuse of discretion.").

Underscoring the point, both *Taggart* and *Shaw* reversed contempt sanctions on strikingly similar facts. In *Taggart*, a group of creditors knew of the debtor's discharge but nonetheless sought attorneys' fees based on "a good faith belief that the discharge injunction did not apply to their claims ..." *Taggart II*, 888 F.3d at 444. The Bankruptcy Court still imposed contempt sanctions on the creditors because it "concluded that it was irrelevant whether the Creditors held a subjective good faith belief that the discharge injunction did not apply to their claim." *Id.* at 443. The Bankruptcy Appellate Panel ("BAP") subsequently reversed the bankruptcy court, and the Ninth Circuit affirmed the BAP. *Id.* at

444. The Ninth Circuit agreed that the creditors' belief that the discharge injunction did not apply was incorrect but nevertheless found that the creditors' "good faith belief, even if unreasonable, insulated them from a finding of contempt." *Id.*

In a similar vein, *Shaw* reversed a bankruptcy court's imposition of sanctions on a creditor for a violation of the discharge injunction because the BAP found the bankruptcy court had conflated the creditor's undisputed knowledge of the injunction's existence with the creditor's knowledge of its applicability and had failed to make "any finding as to whether she knew the discharge injunction 'applied' to her causes of action in the FAC." *Shaw*, 2017 WL 2791663, at *5.

There is also a second, independent basis for vacating the sanctions award. Even assuming *arguendo* that the Bankruptcy Court's decision could be construed as finding that Appellants knew the discharge injunction was applicable, Appellants are correct to argue that an evidentiary hearing would be required to resolve that contested question of fact. Both the Ninth Circuit and BAP have so held. *Zilog*, 450 F.3d at 1008 (Ninth Circuit decision stating that "[i]f, as here, the creditors dispute that they had such knowledge [of the injunction], a finding that they knew of the injunction, and thus willfully violated it, can only be made after an evidentiary hearing."); *Shaw*, 2017 WL 2791663, at*6 (BAP decision finding that "since [the creditor] disputed that the discharge injunction applied to any of her causes of action in the FAC, the bankruptcy court was required to hold an evidentiary hearing, which it did not do."). This too compels reversal.

In sum, the Bankruptcy Court abused its discretion by failing to make a finding that the creditors were aware the discharge injunction applied to their claims and by failing to conduct an evidentiary hearing.

IV. CONCLUSION

For the foregoing reasons, the Court VACATES the Bankruptcy Court's order finding Appellants in contempt and the Bankruptcy Court's order awarding Appellee $19,247.74 in attorney's fees and costs and REMANDS for reconsideration of the sanctions award. On remand, the Bankruptcy Court may find Appellants in contempt and impose appropriate sanctions such as attorney's fees and costs or punitive damages once the Bankruptcy Court has held an evidentiary hearing and applied the legal standard.

IT IS SO ORDERED.

Dated: July 25, 2018
/s/ Lucy H. Koh
LUCY H. KOH
United States District Judge

No. 18-489

In The Supreme Court of the United States

BRADLEY WESTON TAGGART,

Petitioner,

v.

SHELLEY A. LORENZEN, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* THE HONORABLE EUGENE WEDOFF (RET.), THE HONORABLE LEIF CLARK (RET.), AND A GROUP OF LAW PROFESSORS IN SUPPORT OF PETITIONER

DAVID R. KUNEY
Counsel of Record
9200 Cambridge Manor Court
Potomac, MD 20854
301-299-9544
davidkuney@dkuney.com

Attorney for Amici Curiae

November 2018

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTEREST OF THE AMICI CURIAE 1

SUMMARY OF THE ARGUMENT 7

LEGAL ARGUMENT 9

I. The Ninth Circuit departed from the uniform rule of the other circuits by holding that a creditor may pursue collection of a discharged debt as long as the creditor has even an "unreasonable belief" that the discharge does not apply 9

A. The Ninth Circuit's decision created a circuit split 9

B. The Ninth Circuit's decision impairs the core financial benefit of the bankruptcy discharge and injures the "fresh start" of bankruptcy 13

II. The Ninth Circuit's decision will harm the just functioning of the bankruptcy judicial system and encourage abusive creditor conduct 18

III. The Ninth Circuit's decision is inconsistent with this Court's bedrock concept that the bankruptcy discharge is a matter of personal liberty and of great public concern 23

CONCLUSION 25

TABLE OF AUTHORITIES

Page

CASES

Cave v. Valley Collection Services, LLC, 2015 WL 12938941 (D. Ariz. June 18, 2015) 5

In re Bennett, 298 F.3d 1059 (9th Cir. 2002) 12

In re Fina, 550 F. App'x 150 (4th Cir. 2014) 6

In re Gurrola, 328 B.R. 158 (B.A.P. 9th Cir. 2005) 11

In re Hamilton, 540 F.3d 367 (6th Cir. 2008) 11, 19

In re Hardy, 97 F.3d 1384 (1996) 5, 6, 13

In re Hyman, 502 F.3d 61 (2d Cir. 2007) 6, 18

Internal Revenue Service v. Murphy, 892 F.3d 29 (1st Cir. 2018) 5, 12

Knupfer v. Lindblade (*In re Dyer*), 322 F.3d 1178 (9th Cir. 2003) 12, 20

Local Loan Co. v. Hunt, 292 U.S. 234 (1934) 8, 10, 23

Lorenzen v. Taggart (*In re Taggart*), 888 F.3d 438 (9th Cir. 2018) 4, 12, 20, 21

Midland Funding, LLC v. Johnson, 137 S.Ct. 1407 (2017) 19, 24

Stellwagen v. Clum, 245 U.S. 605 (1918) 23

Strata Res. v. State, 264 S.W.3d 832 (Tex. App. 2008) 11, 19

Walls v. Wells Fargo Bank, N.A., 276 F.3d 502 (9th Cir. 2002) 5, 11

TABLE OF AUTHORITIES – Continued

Page

Williams v. United States Fidelity & Guaranty Co., 236 U.S. 549 (1915) 8, 23

Zilog Inc. v. Corning (In re Zilog, Inc.), 450 F.3d 996 (9th Cir. 2006) 12, 13

STATUTES

11 U.S.C. §§ 101 *et seq.* 1

11 U.S.C. § 105 7

11 U.S.C. § 105(a) 11

11 U.S.C. § 524 ..... 6, 7, 11

11 U.S.C. § 524(a)(1) 11

11 U.S.C. § 727(b) 10

H. Rep. No. 95-595 (1977) 22

S. Rep. No. 1688 (1960) (Comm. Rep.) 8

Pub. L. No. 91-467, § 3, 84 Stat. 990 (1970) 10

RULES

Sup. Ct. R. 37 1

Tex. R. Civ. P. 94 19

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Maurie Backman, *This Is the No. 1 Reason Americans File for Bankruptcy*, The Motley Fool (May 1, 2017) https://www.fool.com/retirement/2017/05/01/this-is-the-no-1-reason-americans-file-for-bankrup.aspx 15

2 *William Blackstone, Commentaries* 10

Andrew F. Emerson, *So You Want to Buy a Discharge? Revisiting the Sticky Wicket of Settling Denial of Discharge Proceedings in the Chapter 7 Bankruptcy*, 92 Am. Bank. L.J. 111 (2018) 22

Peter A. Holland, *Junk Justice: A Statistical Analysis of 4,400 Lawsuits Filed by Debt Buyers*, 26 Loy. Consumer L.Rev. 179 (2014) 19, 23

Angela Littwin, *The Affordability Paradox: How Consumer Bankruptcy's Greatest Weakness May Account for Its Surprising Success*, 52 Wm. & Mary L.Rev. 1933 (2011) 22

March 2017 Bankruptcy Filings Down 4.7 Percent, United States Courts (Apr. 19, 2017), http://www.uscourts.gov/news/2017/04/19/march-2017-bankruptcy-filings-down-47-percent 6

John C. McCoid, II, *Discharge: The Most Important Development in Bankruptcy History*, 70 Am. Bankr. L.J. 163 (1996) 14

Amber J. Moren, *Note, Debtor's Dilemma: The Economic Case for Ride-Through in the Bankruptcy Code*, 122 Yale L.J. 1594 (2013) 17

TABLE OF AUTHORITIES – Continued

Page

F. Regis Noel, *A History of the Bankruptcy Law* 200 (1919) 14

Rafael I. Pardo, *An Empirical Examination of Access to Chapter 7 Relief by Pro Se Debtors*, 26 Emory Bankr. Dev. J. 5 (2009) 22

Katherine Porter & Deborah Thorne, *The Failure of Bankruptcy's Fresh Start*, 92 Cornell L.Rev. 67 (2006) 16

Michael D. Sousa, *The Persistence of Bankruptcy Stigma*, 26 Am. Bankr. Inst. L.Rev. 217 (2018) 14, 15, 16

William F. Stone, Jr. & Bryan A. Stark, *The Treatment of Attorneys' Fee Retainers in Chapter 7 Bankruptcy and the Problem of Denying Compensation to Debtors' Attorneys for Post-Petition Legal Services They Are Obligated to Render*, 82 Am. Bankr. L.J. 551 (2008) 22

Teresa A. Sullivan, et al., *As We Forgive Our Debtors: Bankruptcy and Consumer Credit in America* 77 (1999) 14, 18

Teresa A. Sullivan, et al., *Consumer Debtors Ten Years Later: A Financial Comparison of Consumer Bankrupts 1981–1991*, 68 Am. Bankr. L.J. 121 (1994) 17

Teresa A. Sullivan, et al., *Less Stigma or More Financial Distress: An Empirical Analysis of the Extraordinary Increase in Bankruptcy Filings*, 59 Stan. L.Rev. 213 (2006) 16

TABLE OF AUTHORITIES – Continued

Page

Teresa A. Sullivan, et al., *Limiting Access to Bankruptcy Discharge: An Analysis of the Creditors' Data*, 1983 Wis. L.Rev. 1091 (1983) 15

Teresa A. Sullivan, et al., *The Fragile Middle Class: Americans in Debt* (2000) 15

Charles J. Tabb, *Bankruptcy Anthology* 524 (2002) 13

Charles J. Tabb, *The Historical Evolution of the Bankruptcy Discharge*, 65 Am. Bankr. L.J. 325 (1991). 17

Jay L. Zagorski & Lois R. Lupica, *A Study of Consumers' Post-Discharge Finances: Struggle, Stasis, or Fresh-Start?* 16 Am. Bankr. Inst. L.Rev. 283 (2008) 16, 17

INTEREST OF THE AMICI CURIAE[1]

The amici curiae, whose names are set forth below, include two retired United States bankruptcy judges and a group of law professors. Your amici teach courses on bankruptcy law, conduct research, and are frequent speakers and lecturers at seminars and conferences on bankruptcy law. Our interest in submitting this brief is to assist the Court by pointing to relevant legal scholarship and empirical studies that demonstrate the central importance of the discharge provisions of the U.S. Bankruptcy Code.[2] We are concerned that the decision by the Ninth Circuit, by undercutting the discharge, will significantly weaken the protection of the discharge provisions of the Code and will thereby cause unwarranted financial injury both to individual debtors and to the larger economy.

The Honorable Eugene Wedoff (ret.) served as a United States Bankruptcy Judge in the Northern District of Illinois in Chicago from 1987 to 2015 and as Chief Judge from 2002 to 2007. Judge Wedoff was formerly a partner at Jenner & Block. He served as chair of the Advisory Committee on Bankruptcy Rules from 2004 to 2014 and as a governor, secretary, and president of the National Conference of Bankruptcy Judges

---

[1] Pursuant to Supreme Court Rule 37, counsel of record for petitioner and respondents received notice of the intent to file this brief more than ten days before its due date and have consented to its filing. No counsel for a party authored this brief in whole or in part, and no person other than amici or their counsel contributed any money to fund its preparation or submission.

[2] 11 U.S.C. §§ 101 *et seq.* (the "Code").

through 2015. He is the immediate past president of the American Bankruptcy Institute.[3] He is a Fellow of the American College of Bankruptcy and a member of the National Bankruptcy Conference.

The Honorable Leif M. Clark (ret.) served as a United States Bankruptcy Judge for the Western District of Texas from 1987 to 2012. Prior to that, he was a partner with Cox & Smith (now Dykema Cox Smith). He served on the endowment boards for both the American Bankruptcy Institute and the National Conference of Bankruptcy Judges, evaluating grant requests for empirical work in bankruptcy. He assisted in developing and administering judicial training programs for judges in Central and Eastern Europe. He is a member of the American College of Bankruptcy and the National Bankruptcy Conference, and continues to speak on bankruptcy topics nationwide.

Professor Margaret Howard is the Law Alumni Association Professor of Law, Emerita, at Washington and Lee University School of Law, Lexington, Virginia. She holds a B.A. from Duke University, a J.D. and M.S.W. from Washington University in St. Louis, and an LL.M. from Yale University. She has served as the Scholar in Residence at the American Bankruptcy Institute, and as the American Bankruptcy Institute's Vice President in charge of the Research Grants Committee. She is a fellow of the American College of

---

[3] The views set forth herein are the personal views of Judge Wedoff and the named amici and may not reflect any position of the American Bankruptcy Institute, which has not participated in this appeal.

Bankruptcy and the American Law Institute. Her publications include *A Theory of Discharge in Consumer Bankruptcy*, 48 Ohio St. L.J. 1047 (1987), and *Stripping Down Liens: Section 506(d) and the Theory of Bankruptcy*, 65 Am. Bankr. L.J. 373 (1991).

Professor Bruce A. Markell is the Professor of Bankruptcy Law and Practice at Northwestern Pritzker School of Law, part of Northwestern University. He is a former bankruptcy judge and a former member of the Ninth Circuit's Bankruptcy Appellate Panel. He is a co-author of four casebooks in bankruptcy, contracts, secured transactions, and securitization. He is a founding member of the International Insolvency Institute, a member of the Board of Editors of Collier on Bankruptcy, an elected member of the American Law Institute, a conferee of the National Bankruptcy Conference, and a fellow of the American College of Bankruptcy, where he was the Scholar in Residence from 2013 to 2016.

Professor Michael D. Sousa is an Associate Professor of Law at the University of Denver Sturm College of law. He received his J.D. from Rutgers University School of Law, his LL.M. in bankruptcy from St. John's University School of Law, his Master's of Arts degree in anthropology from the University of Denver, and is currently pursuing a Ph.D. in sociology from the University of Colorado–Boulder. He is a member of the Advisory Board for the LL.M. in Bankruptcy Program at St. John's University School of Law and sits on the Editorial Boards for both the American Bankruptcy

Institute Law Review and the American Bankruptcy Law Journal.

Professor Jack F. Williams is a Professor of Law at Georgia State University and the Center for Middle East Studies, where he teaches and/or conducts research on bankruptcy and business organizations; mergers and acquisitions; and taxation and statistics. He is the Scholar in Residence of the Association of Insolvency and Restructuring and a fellow in the American College of Bankruptcy. He holds a B.A. in economics from the University of Oklahoma, a J.D. with High Honors from George Washington University National Law Center, and a Ph.D. in archaeology from the University of Leicester in Leicester, United Kingdom.

David R. Kuney has served as an Adjunct Professor at the Georgetown University Law Center, American University's Washington College of Law and at New York Law School. He was formerly a partner at the law firm of Sidley & Austin. He serves on the Board of Directors of the American Bankruptcy Institute. He is a fellow in the American College of Bankruptcy and the American College of Real Estate Lawyers.

The Ninth Circuit held that a creditor's knowing violation of the discharge injunction, arising under § 524 of the Code, cannot be punished by contempt if the creditor had a good faith, subjective belief that the discharge did not pertain to *its claim*. *Lorenzen v. Taggart* (*In re Taggart*), 888 F.3d 438 (9th Cir. 2018). The court held that even an "unreasonable belief" can

satisfy the good faith standard. In effect, the court's ruling makes ignorance of the law a complete defense to a knowing violation of the discharge injunction. Because contempt may be the sole remedy for a violation of the discharge injunction,[4] this ruling is of great significance and is certain to restrict a debtor's ability to obtain relief from violations of the discharge injunction.

The Ninth Circuit's decision "creates a square conflict" among the circuits. (Pet. 11.) The Eleventh Circuit has stated that "the focus of the court's inquiry in civil contempt proceedings is not on the subjective beliefs or intent of the alleged contemnor in complying with the order, but whether in fact their conduct complied with the order at issue." *In re Hardy*, 97 F.3d 1384, 1390 (1996) (citation omitted). Likewise, the First Circuit recently recognized as "settled law" that "a creditor's good faith belief . . . is not relevant to a determination of whether the violation was wilful [and hence subject to contempt sanctions]." *Internal Revenue Service v. Murphy*, 892 F.3d 29, 34 (1st Cir. 2018).[5] Similarly, the Fourth Circuit has held that a willful violation of the discharge "requires only that the acts

---

[4] Various courts have held that the exclusive remedy for violation of the discharge injunction is a contempt proceeding. *Walls v. Wells Fargo Bank, N.A.*, 276 F.3d 502, 508 (9th Cir. 2002). *See also Cave v. Valley Collection Services, LLC*, 2015 WL 12938941 (D. Ariz. June 18, 2015).

[5] The First Circuit noted that by 1998 bankruptcy courts had begun applying the generally accepted definitions of "willful violations" of the automatic stays to violations of discharge orders. *Murphy*, 892 F.3d at 38, citing *In re Hardy*.

taken in violation of the injunction be intentional," and that "a good faith mistake is generally not a valid defense." *In re Fina*, 550 F. App'x 150, 154 (4th Cir. 2014).

Granting certiorari is of critical importance to more than the parties at hand. Nearly one million individuals seek bankruptcy relief each year.[6] It is the bankruptcy discharge that alters the often grim reality facing many bankruptcy debtors and restores them to being productive members of the economy. The "failure to achieve discharge can amount to a financial death sentence." *In re Hyman*, 502 F.3d 61, 66 (2d Cir. 2007).

Yet, the discharge would be lifeless without the injunction found in § 524, and the injunction itself would be toothless without the power to enforce it through contempt sanctions. To weaken § 524 by making the standard for contempt nearly unreachable is to strip the discharge of much of its core protection and so to neuter one of the most critical aspects of the consumer bankruptcy system.

Accordingly, your amici urge this Court to grant certiorari. The rule of law as stated by the Eleventh Circuit in *Hardy*, 97 F.3d 1384 is correct, and we urge its application upon consideration of the full merits.

---

[6] The number of non-business bankruptcy filings in 2017, 2016, and 2015 was as follows: 770,901, 808,781, and 911,086, respectively. *March 2017 Bankruptcy Filings Down 4.7 Percent*, United States Courts (Apr. 19, 2017), http://www.uscourts.gov/news/2017/04/19/march-2017-bankruptcy-filings-down-47-percent.

SUMMARY OF THE ARGUMENT

Bradley Taggart's petition for a writ of certiorari correctly identifies the depth of the circuit split for imposing sanctions for violation of the discharge injunction under 11 U.S.C. §§ 524 and 105. We agree. This amicus brief presents substantial empirical evidence and scholarship that are not a principal part of the petitioner's brief, but which will be helpful to the Court in determining whether to grant the petition. Further, this brief demonstrates the importance of this appeal to many more parties than those before this Court and indeed, to the fundamental operation of the bankruptcy system.

First, the decision by the Ninth Circuit, in departing from the majority of other circuit courts, will cause harm to thousands of individual debtors who seek the fresh start granted by the bankruptcy discharge. A large body of empirical data and peer-reviewed scholarship demonstrate the value, need, and consequence of the bankruptcy discharge. The discharge is all that stands between thousands of debtors and an economic existence marginal at best. This empirical evidence fully supports enforcement of the bankruptcy discharge by a vigorous and meaningful contempt power. Resolution of the circuit split is required to protect this fundamental aspect of bankruptcy law.

Second, the Ninth Circuit's ruling will harm the effective operation of the bankruptcy system by permitting unwanted gamesmanship. Congress has already noted that institutional creditors often seek to

intimidate debtors into surrendering their valid discharge rights. *See* S. Rep. No. 1688 at 2-3 (1960) (Comm. Rep.). The decision will encourage facile challenges by aggressive creditors who will argue that despite express knowledge of the discharge order, they were somehow unaware that it applied to *their* claim and hence cannot be found in contempt. The decision removes most of the risk in a creditor's enforcing a discharged claim. This is because (a) the sole remedy for violating the discharge injunction may be a contempt proceeding, (b) the burden of proof to establish contempt and show a willful violation is high, and (c) the legal costs of pursuing a contempt proceeding are typically more than what a debtor can bear. All of this leaves debtors with a nearly insurmountable barrier to meaningful relief.

Third, the decision is contrary to the long-standing statements of this Court protecting the bankruptcy discharge. For over 100 years this Court has recognized the need for the legal system to be responsive to "the weight of oppressive indebtedness." *Williams v. United States Fidelity & Guaranty Co.*, 236 U.S. 549, 554-55 (1915). This Court's landmark decision in *Local Loan Co. v. Hunt*, 292 U.S. 234, 245 (1934) held that the discharge is *both* a "fundamental private necessity" and a matter of "great public concern." Granting certiorari protects both.

Accordingly, the petition for writ of certiorari should be granted in order to resolve the circuit split by providing a uniform standard for establishing when

a creditor has acted in contempt of the discharge injunction.

LEGAL ARGUMENT

I. The Ninth Circuit departed from the uniform rule of the other circuits by holding that a creditor may pursue collection of a discharged debt as long as the creditor has even an "unreasonable belief" that the discharge does not apply.

A. The Ninth Circuit's decision created a circuit split.

The crux of this appeal is the Ninth Circuit's adoption of an unprecedented legal principle that if a creditor has an "unreasonable" but good faith belief that the discharge injunction does not apply to *its* claim, then its faulty understanding is a complete defense to the imposition of sanctions for its violation of the injunction. In short, the ruling by the Ninth Circuit makes ignorance of the law a defense to violating the discharge injunction, and thus impairs one of the core values of the Bankruptcy Code. The ruling leaves debtors with virtually no meaningful sanction against wrongful collection activities.

Discharge provisions are the heart and soul of bankruptcy for individual debtors. Over 200 years ago Sir William Blackstone wrote that through the discharge "the bankrupt becomes a clear man again; and, by the assistance of his allowance and his own

industry, may become a useful member of the commonwealth." 2 *William Blackstone, Commentaries* *484.

This Court held much the same when it declared that one of the primary purposes of the Bankruptcy Act was to "relieve the honest debtor from the weight of oppressive indebtedness, and permit him to start afresh free from [oppressive debt] obligations." *Local Loan Co.*, 292 U.S. at 244. This purpose has "again and again [been] emphasized by the courts as being of public as well as private interest." *Id.* Indeed, the discharge was seen as a "fundamental private necessity." *Id.* at 245.

Local Loan further held that an attempt to collect a debt in violation of the discharge order could be enjoined by a bankruptcy court. *Id.* at 241. Congress codified *Local Loan's* discharge as injunction in 1970, declaring that "an order of discharge shall enjoin all creditors whose debts are discharged from thereafter instituting or continuing any action . . . to collect such debts. . . ." Pub. L. No. 91-467, § 3, 84 Stat. 990, 991 (1970).

The 1978 Code carries forward the same notion of the central importance of the discharge and provides for injunctive protection. Section 727 of the Code provides that a bankruptcy court "shall grant the debtor a discharge" in the absence of exceptions inapplicable here. The discharge is broad. It "discharges the debtor from all debts that arose before the date of the [bankruptcy petition]." 11 U.S.C. § 727(b) (2018). Debtors are protected from interference by creditors with their

discharge by § 524, which states that discharge "operates as an injunction against the commencement or continuation of an action . . . to collect, recover or offset any such debt as a personal liability of the debtor."

Section 524(a)(1) underscores the importance of the discharge by providing that a judgment obtained on a discharged debt is "void." By so doing, Congress has provided that the discharge is not merely an "affirmative defense" in a collection suit, but is an absolute, non waivable defense, and that any judgment obtained in violation of the discharge is void.[7] *See In re Gurrola*, 328 B.R. 158, 170 (B.A.P. 9th Cir. 2005).

Although Congress has not designated a specific sanction for a violation of the discharge injunction, Congress has granted the bankruptcy courts important powers to protect their jurisdiction. Under § 105(a) a bankruptcy court may "issue any order, process or judgment that is necessary or appropriate to carry out the provisions of this title." That a bankruptcy court may use the contempt power to protect its jurisdiction under § 105(a) is well established. *Walls*, 276 F.3d 502, 508 (stating that contempt is the "traditional remedy" and perhaps the sole remedy for discharge violations).

---

[7] *See In re Hamilton*, 540 F.3d 367, 372 (6th Cir. 2008). "This provision was designed 'to effectuate the discharge and make it unnecessary to assert it as an affirmative defense in a subsequent state court action.'" (citation omitted). *But cf.*, *Strata Res. v. State*, 264 S.W.3d 832, 843 (Tex. App. 2008), discussed *infra*.

Here, the Ninth Circuit held that even the potentially exclusive remedy of contempt may be unavailable if a creditor can show merely that it acted with a good faith belief that the discharge injunction did not apply to its claims. The court came to this result in two steps. First, it held that clear knowledge of the discharge itself is not enough. "To justify sanctions, the movant must prove that the creditor (1) knew the discharge injunction was applicable and (2) intended the actions which violated the injunction." *Taggart*, 888 F.3d at 443 (citing *In re Bennett*, 298 F.3d 1059, 1069 (9th Cir. 2002)).

Second, the Ninth Circuit departed from settled law by holding that even an unreasonable belief that the discharge does not apply is a complete defense. "Additionally, the creditor's good faith belief that the discharge injunction does not apply to the creditor's claim precludes a finding of contempt, even if the creditor's belief is unreasonable." *Id.* at 444 (citing *Zilog Inc. v. Corning* (*In re Zilog, Inc.*), 450 F.3d 996, 1009 n.14 (9th Cir. 2006)). In so ruling, as noted above, the Ninth Circuit failed to follow the majority rule followed in the First, Fourth and Eleventh Circuits.[8]

Nothing in the Code's language nor legislative history is cited in support of the Ninth Circuit's holding.

---

[8] In the similar context of the automatic stay, the majority of decisions have rejected the approach of the Ninth Circuit and have held exactly to the contrary, stating a "creditor's 'good faith' belief that he is not violating the automatic stay provision is not determinative. . . ." *IRS v. Murphy*, 892 F.3d at 38; *Knupfer v. Lindblade* (*In re Dyer*), 322 F.3d 1178, 1190-91 (9th Cir. 2003).

The Ninth Circuit relied entirely on an earlier circuit decision, *Zilog*, for this proposition. Yet, *Zilog's only* reference to an "unreasonable" belief as a defense is found in a footnote discussing the standard applicable on remand. *Zilog*, 450 F.3d 1009 n.14. The footnote itself contains no discussion and no citation to authority. Yet, the Ninth Circuit in *Zilog* cited *Hardy* with approval, 450 F.3d at 1008, n.12, and *Hardy* rejects the very principle found in the foonote. 97 F.3d 1384 at 1390.

The Ninth Circuit's ruling has now made a finding of contempt unlikely despite a creditor's serious misconduct, including even inexplicable carelessness in assessing its legal obligations. There is no reason to conclude that such an outcome was intended by Congress and it is for good reason that the other circuit courts have not created such a rule.

B. The Ninth Circuit's decision impairs the core financial benefit of the bankruptcy discharge and injures the "fresh start" of bankruptcy.

The bankruptcy discharge for individual debtors is central to the operation of the bankruptcy system; yet the Ninth Circuit's decision impairs the core economic benefit of the discharge for individual debtors. "[T]he introduction of the discharge [into modern bankruptcy law] could well be considered the single most important event in bankruptcy history." Charles J. Tabb, *Bankruptcy Anthology* 524 (2002). Indeed, commentators have observed that the bankruptcy

discharge "ranks ahead in importance of all other [provisions] in Anglo-American bankruptcy history. . . ." John C. McCoid, II, *Discharge: The Most Important Development in Bankruptcy History*, 70 Am. Bankr. L.J. 163, 164 (1996). The discharge is the "crown jewel of [bankruptcy] legislation." F. Regis Noel, *A History of the Bankruptcy Law* 200 (1919).

A substantial body of scholarship and empirical evidence demonstrates the number of ways in which the discharge is of vital importance to both the individual debtor and to the larger economy.[9] First, those who file for bankruptcy relief and seek the discharge are in desperate need of relief, are not "can pay" debtors and suffer serious stigma from the filing. Empirical data demonstrates that the typical individual debtor turns to bankruptcy due to a serious economic plight, and not as a result of misconduct, over-spending, or other non-productive economic behavior. "[W]hen bankrupt debtors as a group are compared to the general population, their situations are grim." Teresa A. Sullivan, et al., *As We Forgive Our Debtors: Bankruptcy and Consumer Credit in America* 77 (1999). The authors found that debtors have "staggering debts in relation to their

---

[9] While some of the articles are twenty years old, their influence continues to the present day, and their underlying insights remain valid. *See generally* Michael D. Sousa, *The Persistence of Bankruptcy Stigma*, 26 Am. Bankr. Inst. L.Rev. 217 (2018) (hereafter "Sousa") (collecting prominent research articles and substantial data bases on discharge issues).

income" and are a "segment of America in financial collapse." *Id.*[10]

Second, the decision to file for bankruptcy is usually the result of oppressive debt obligations, including catastrophic medical problems such as cancer, automobile and industrial accidents, and age-related issues.[11] When asked why they filed for bankruptcy, 67.5 percent of debtors reported job loss, 19.3 percent cited a medical event, and 22.1 percent listed family concerns (i.e., divorce for example) as contributing factors. Teresa A. Sullivan, et al., *The Fragile Middle Class: Americans in Debt*, 16 fig. 1.2 (2000). These Americans file for bankruptcy not because it is "an easy way out," but because they have run out of options. Teresa A. Sullivan, et al., *Limiting Access to Bankruptcy Discharge: An Analysis of the Creditors' Data*, 1983 Wis. L.Rev. 1091, 1138 (1983). In other words, "[f]ew people file bankruptcy without crushing debts." Sousa, *supra* at 226.

The filing for bankruptcy is traumatic and causes feelings of stigma and shame.[12] According to empirical

---

[10] "The economic profile of debtors [in their study] demonstrated that the later group was in far worse financial trouble than their earlier counterparts as measured by, among other variables, debt-to-income ratios and the amount of average unsecured debt." Sousa, *supra* at 228.

[11] Maurie Backman, *This Is the No. 1 Reason Americans File for Bankruptcy*, The Motley Fool (May 1, 2017) https://www.fool.com/retirement/2017/05/01/this-is-the-no-1-reason-americans-file-for-bankrup.aspx.

[12] "There is robust literature in the social sciences regarding the association between socioeconomic disadvantage and mental

data collected by Professor Michael D. Sousa, most of the debtors he interviewed "experienced deep feelings of shame, embarrassment and instances of stigmatization." Sousa, *supra* at 230. Indeed, "bankruptcy stigma appears to have increased over the past four decades. . . ." *Id.* at 235. "[S]tigma has increased and the rising numbers of filings are actually the net result of two opposing trends—economic forces may have pushed more families to the brink of bankruptcy, while increasing stigma may have prevented ever more distressed families from filing." *Id.* at 239 (citing Teresa A. Sullivan, et al., *Less Stigma or More Financial Distress: An Empirical Analysis of the Extraordinary Increase in Bankruptcy Filings*, 59 Stan. L.Rev. 213, 228-33 (2006)).

Discharge is vital in a third respect: it has shown a demonstratable effect in restoring debtors to a productive role in the larger economy. Indeed, "the average person who files for bankruptcy to relieve financial stress catches up with their peers." Jay L. Zagorski & Lois R. Lupica, *A Study of Consumers' Post-Discharge Finances: Struggle, Stasis, or Fresh-Start?* 16 Am. Bankr. Inst. L.Rev. 283, 289 (2008).[13] "None of the data indicate that over time the size of the financial gap

---

health, including suicide. . . . [T]he more debt an individual possessed the more likely that he or she suffered from mental disorder, neurosis, psychosis, alcohol dependency or drug dependency." Sousa, *supra* at 232 (citations omitted).

[13] *See also* Katherine Porter & Deborah Thorne, *The Failure of Bankruptcy's Fresh Start*, 92 Cornell L.Rev. 67, 87 (2006) ("The majority, 65% of families, reported that their financial situations had improved since they filed bankruptcy.").

between bankruptcy filers and non-filers either gets wider or stays the same; for the most part, the size of the financial gap between these two groups narrows over time." *Id.* at 307.

Fourth, without bankruptcy discharge, only a small fraction of debtors has any hope of repaying their debt outside of bankruptcy. Even those debtors who voluntarily attempted repayment in Chapter 13 were in abysmal shape: at most, only about a third were able to complete their repayment plans, and a significant portion of those debtors were making only minimal repayments. *See* Teresa A. Sullivan, et al., *Consumer Debtors Ten Years Later: A Financial Comparison of Consumer Bankrupts 1981–1991*, 68 Am. Bankr. L.J. 121, 123 (1994).

Discharge benefits both debtors and the larger macro economy. "The theory is that society as a whole benefits when an overburdened debtor is freed from the oppressive weight of accumulated debt. The debtor then is able to resume his or her place as a productive member of society." Charles J. Tabb, *The Historical Evolution of the Bankruptcy Discharge*, 65 Am. Bankr. L.J. 325, 364-65 (1991). "Bankruptcy law . . . serves significant macroeconomic goals[;] . . . the Chapter 7 debt discharge prevents the development of an insolvent underclass. . . ." Amber J. Moren, Note, *Debtor's Dilemma: The Economic Case for Ride-Through in the Bankruptcy Code*, 122 Yale L.J. 1594, 1618 (2013).

Ultimately, empirical data show that "bankruptcy laws are generally serving the people they were

designed to serve: people in serious, even hopeless financial trouble, who need either a fresh-start discharge from their debts or at least some [breathing spell]." Sullivan, *As We Forgive Our Debtors*, *supra* at 77. Conversely, the failure to obtain a discharge is often catastrophic. "The consequences to a debtor whose obligations are not discharged are considerable; in many instances, failure to achieve discharge can amount to a financial death sentence." *In re Hyman*, 502 F.3d at 66.

II. The Ninth Circuit's decision will harm the just functioning of the bankruptcy judicial system and encourage abusive creditor conduct.

A separate justification for granting the petition for a writ of certiorari is that the Ninth Circuit's decision will permit, if not encourage, abusive creditor conduct. It will do so by eliminating much of the risk facing a creditor inclined to disregard the discharge injunction and initiate a civil suit on a discharged claim. If a debtor objects, a creditor can readily plead lack of knowledge that the discharge applied to its claim. Thus, instead of merit based resolutions, the system will allow under-represented and *pro se* debtors to be intimidated into surrendering their opportunity for a fresh start.

There are many factors which induce creditors to file claims even with knowledge of the discharge. First, Congress intended to "make it unnecessary to assert

[discharge] as an affirmative defense in a subsequent state court action." *See In re Hamilton*, 540 F.3d 367, 372 (6th Cir. 2008). "The purpose of the provision [§ 524] is to make it absolutely unnecessary for the debtor to do anything at all in the collection action." *Id.* at 373. Despite this mandate some state statutory enactments still identify discharge as an affirmative defense and some courts seem to make statements that vary from the federal law. *See, e.g.*, *Strata Res. v. State*, 264 S.W.3d 832, 843 (Tex. App. 2008); *see also* Tex. R. Civ. P. 94 ("In a pleading to a proceeding a party shall set forth affirmatively . . . discharge in bankruptcy. . . .").

It has often been noted that individual debtors are unlikely to appear and defend against collection suits, regardless of a valid defense. Justice Sotomayor observed this in a similar context, noting that consumer debtors often permit the entry of default judgments, regardless of the merits of a claim; institutional debt collectors take advantage of this. "[C]onsumers do fail to defend themselves in court—in fact, according to the FTC, over 90% fail to appear at all. . . . The result is that debt buyers have won 'billions of dollars in default judgment' by simply filing suit and betting that consumers will lack the resources to respond." *Midland Funding, LLC v. Johnson*, 137 S.Ct. 1407, 1417 (2017) (Sotomayor, J. dissenting).[14]

---

[14] This observation is supported by the empirical literature. *See generally* Peter A. Holland, *Junk Justice: A Statistical Analysis of 4,400 Lawsuits Filed by Debt Buyers*, 26 Loy. Consumer L.Rev. 179 (2014).

Moreover, the burden of proof is a substantial barrier for debtors who seek to enforce the discharge injunction in bankruptcy court. The Ninth Circuit held that "the moving party [the debtor] has the burden of showing by clear and convincing evidence that the contemnors violated a specific and definite order of the court." *In re Taggart*, 888 F.3d at 443. *See also In re Dyer*, 322 F.3d at 1190. Further elaborating, the court stated that "to justify sanctions the movant [the debtor] must prove that the creditor (1) *knew* the discharge injunction was applicable and (2) *intended* the actions which violated the injunction." *Id.* (emphases added).

Thus, the debtor's burden includes specific showings of "knowledge" of the injunction and "intent" to commit the violative acts; both elements embrace highly subjective states of mind and both must be shown by clear and convincing evidence. Under the clear and convincing standard the debtor must "place in the ultimate fact finder an abiding conviction that the truth of its factual contentions are 'highly probable.' Factual contentions are highly probable if the evidence offered in support of them 'instantly tilt[s] the evidentiary scales in the affirmative when weighed against the evidence [the non-moving party] offered in opposition.'" *In re Taggart*, 548 B.R. at 288 n.11 (citation omitted).

Assuming the debtor somehow shows the requisite intent and knowledge, the burden then shifts to the creditor, who can prevail by merely showing "good

faith."[15] One may fairly question how the typical individual debtor can realistically rebut an institutional creditor's subjective claim of good faith. Bad faith cannot be inferred from knowledge of the bankruptcy alone. *In re Taggart*, 888 F.3d at 443. An unreasonable belief that a creditor was not barred from suing on a discharged claim will often be easily created, and it is difficult to imagine how a debtor could satisfy its burden in refuting good faith, absent an unlikely "confession" by the creditor

Finally, burden aside, the cost and time to litigate the creditor's state of mind can be well beyond what an individual debtor can bear. The subjective standard of "good faith" would require the debtor to engage in costly discovery, some of which is likely to be resisted. Individual debtors frequently lack the resources to pay legal counsel to defend against discharge litigation, as Congress well knows. Beginning in at least 1960, Congress became aware that the discharge provisions were being manipulated by institutional creditors who were able to intimidate even honest debtors into surrendering their discharge in order to avoid litigation. Prior to enactment of the 1978 Code, the House Judiciary Committee noted that "[t]he threat of litigation over this [discharge] exception and its attendant costs are often

---

[15] This is precisely what occurred below. The bankruptcy court concluded that the respondents "knowingly violated the discharge injunction." *In re Taggart*, 888 F.3d at 444. The bankruptcy court found that a good faith belief that the discharge was inapplicable was irrelevant. *Id.* The BAP, however, held that a good faith belief was determinative. *Id.*

enough to induce the debtor to settle for a reduced sum, in order to avoid the costs of litigation" even with respect to "marginal cases." H. Rep. No. 95-595 (1977).[16] *See also* Andrew F. Emerson, *So You Want to Buy a Discharge? Revisiting the Sticky Wicket of Settling Denial of Discharge Proceedings in the Chapter 7 Bankruptcy*, 92 Am. Bank. L.J. 111, 118–123 (2018).

Debtors are unlikely to be able to rely on their Chapter 7 counsel to represent them in discharge litigation. Lawyers have no duty to do so. Legal counsel for Chapter 7 debtors frequently "unbundle" their legal services and decline to undertake representation of the debtor in an adversary proceeding challenging the discharge. "Unbundling" allows an attorney to limit the scope of his or her representation by excluding expensive tasks like adversary proceedings from their general services. Chapter 7 debtor counsel have no obligation to represent the debtor post-discharge if a civil suit is filed in state court to collect on a discharged claim. Debtors who appear *pro se* have less favorable outcomes in judicial proceedings.[17]

---

[16] *See also* William F. Stone, Jr. & Bryan A. Stark, *The Treatment of Attorneys' Fee Retainers in Chapter 7 Bankruptcy and the Problem of Denying Compensation to Debtors' Attorneys for Post-Petition Legal Services They Are Obligated to Render*, 82 Am. Bankr. L.J. 551, 555 n.25 (2008).

[17] *See, e.g.*, Rafael I. Pardo, *An Empirical Examination of Access to Chapter 7 Relief by Pro Se Debtors*, 26 Emory Bankr. Dev. J. 5 (2009); Angela Littwin, *The Affordability Paradox: How Consumer Bankruptcy's Greatest Weakness May Account for Its Surprising Success*, 52 Wm. & Mary L.Rev. 1933, 1957 (2011) ("The percentage of pro se cases rose statistically significantly,

Conversely, intuitional creditors are typically well-armed with counsel. The plaintiff in such suits is frequently not the original creditor, but one of the "bottom fishers" who buy consumer debt for pennies on the dollar, and often file suits despite facial defects.[18] These institutional creditors are well funded and are often willing to bet that consumers will lack the resources to protect their rights. *See id.* ("The clearest trend, repeatedly highlighted in the literature, is that defendants often do not respond to collection suits.") Holland, *Junk Justice*, *supra* at 227.

III. The Ninth Circuit's decision is inconsistent with this Court's bedrock concept that the bankruptcy discharge is a matter of personal liberty and of great public concern.

This Court has consistently emphasized that the bankruptcy discharge is of profound public and private importance. In 1915 this Court correctly perceived the need to have a legal system that restores debtors to productive participation in the economy. *See Williams v. United States*, *supra*. 236 U.S. 549, 554-55. In 1918, this Court emphasized the "great public interest" in protecting the discharge. *Stellwagen v. Clum*, 245 U.S. 605, 617.

Local Loan, in 1934, recognized that the discharge protects the power of an individual to earn a living, and

---

especially among lower-income debtors, while the percentage of these cases ending with a discharge of debt declined.").

[18] *See generally* Holland, *Junk Justice*, *supra*; *Midland Funding*, 137 S.Ct. 1407 (2017).

thus to function in society as a productive person. "The power of the individual to earn a living for himself and those dependent upon him is in the nature of a personal liberty quite as much as, if not more than, it is a property right." The need to provide for, and then protect, the bankruptcy discharge, remains a bedrock concept that has inhered in bankruptcy jurisprudence for almost 100 years. It has guided Congress and found clear expression in legislative history and the 1978 Code. It is entirely consistent with modern scholarship and empirical data.

Standing apart from this unbroken view, the Ninth Circuit's decision would eviscerate the discharge injunction by requiring the debtor to prove the nearly unprovable; namely, the subjective intent of an institutional creditor whose conduct is shielded by layers of faceless employees and who would be free to act in a fashion that fails to meet an objective standard of good faith.

Unless the Ninth Circuit's decision is reversed, bankruptcy courts will be forced to do exactly what Justice Sotomayor warned against; namely to "engage in novel and unfettered inquiries into a 'creditor's state of mind.'" *Midland*, 137 S.Ct. at 1419 n.5. The Ninth Circuit's decision is untethered to legislative history or any language in the Code. By accepting certiorari this Court can now provide for a uniform rule, already followed by a majority of the circuits, and thus protect what has been sound wisdom and jurisprudence for nearly a century.

CONCLUSION

For the foregoing reasons, we respectfully request that this Court grant the petition for writ of certiorari.

Dated: November 2018

Respectfully submitted,

DAVID R. KUNEY
9200 Cambridge Manor Court
Potomac, MD 20854
301-299-9544
davidkuney@dkuney.com
Attorney for Amici Curiae

No. 18-489

In the Supreme Court of the United States

BRADLEY WESTON TAGGART, PETITIONER

v.

SHELLEY A. LORENZEN, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOINT APPENDIX

DANIEL L. GEYSER
GEYSER P.C.
One Energy Square
4925 Greenville Ave., Ste. 200
Dallas, TX 75206
(214) 800-2660
daniel.geyser@geyserpc.com

Counsel of Record
for Petitioner

NICOLE A. SAHARSKY
MAYER BROWN LLP
1999 K Street, NW
Washington, DC 20006-1101
(202) 263-3000
nsaharsky@mayerbrown.com

Counsel of Record
for Respondents

PETITION FOR A WRIT OF CERTIORARI FILED: OCTOBER 15, 2018
CERTIORARI GRANTED: JANUARY 4, 2019

TABLE OF CONTENTS

Page

Court of appeals docket entries 1
Bankruptcy appellate panel docket entries 22
District court docket entries 30
Bankruptcy court docket entries 36
Bankruptcy court discharge order (Feb. 23, 2010) 59
Petitioner's objection to judgment (Mar. 14, 2011) 63
Transcript of proceedings—hearing regarding judgment (May 2, 2011) 70
Respondents' petition for attorney's fees and costs (June 9, 2011) 75
Petitioner's objections to attorney's fees and costs (June 20, 2011) 81
Petitioner's hearing memorandum regarding attorney's fees (Aug. 1, 2011) 84
Transcript of proceedings—hearing regarding attorney's fees (Aug. 1, 2011) 87
State trial court letter ruling regarding attorney's fees (Aug. 11, 2011) 96
State court of appeals opinion (Nov. 26, 2014) 100

The following opinions, decisions, judgments, and transcripts have been omitted in printing the joint appendix because they already appear on the following pages in the appendix to the petition for a writ of certiorari or the supplemental appendix to the brief in opposition:

Appendix A: Court of appeals opinion (Apr. 23, 2018) 1a

Appendix B: Court of appeals order (Sept. 7, 2018) 16a

Appendix C: Bankruptcy appellate panel opinion (Apr. 12, 2016) 21a

Appendix D: Bankruptcy court opinion regarding contempt liability (Dec. 16, 2014) 52a

Appendix E: Bankruptcy court opinion regarding contempt damages (Mar. 17, 2015) 65a

Supp. App. A: District court opinion regarding discharge violation (Aug. 6, 2012) 1a

Supp. App. B: Bankruptcy court opinion denying sanctions (Jan. 23, 2012) 12a

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 16-35402

In re BRADLEY WESTON TAGGART,
Debtor,

SHELLEY A. LORENZEN, Executor of Estate of Stuart Brown; TERRY W. EMMERT; KEITH JEHNKE; SHERWOOD PARK BUSINESS CENTER, LLC,
Appellants,

v.

BRADLEY WESTON TAGGART,
Appellee.

No. 16-60032

In re BRADLEY WESTON TAGGART,
Debtor,

BRADLEY WESTON TAGGART,
Appellant,

v.

SHELLEY A. LORENZEN, Executor of Estate of Stuart Brown; TERRY W. EMMERT; KEITH JEHNKE; SHERWOOD PARK BUSINESS

CENTER, LLC,
Appellees.

No. 16-60033

In re BRADLEY WESTON TAGGART,
Debtor,

BRADLEY WESTON TAGGART,
Appellant,

v.

TERRY W. EMMERT; KEITH JEHNKE;
SHERWOOD PARK BUSINESS CENTER, LLC;
SHELLEY A. LORENZEN, Executor of Estate of
Stuart Brown
Appellees.

No. 16-60039

In re BRADLEY WESTON TAGGART,
Debtor,

SHELLEY A. LORENZEN, Executor of Estate of
Stuart Brown,
Appellant,

v.

BRADLEY WESTON TAGGART,
Appellee.

No. 16-60040

In re BRADLEY WESTON TAGGART,
Debtor,

TERRY W. EMMERT; KEITH JEHNKE;
SHERWOOD PARK BUSINESS CENTER, LLC,
Appellants,

v.

BRADLEY WESTON TAGGART,
Appellee.

No. 16-60042

In re BRADLEY WESTON TAGGART,
Debtor,

SHELLEY A. LORENZEN, Executor of Estate of
Stuart Brown,
Appellant,

v.

BRADLEY WESTON TAGGART,
Appellee.

No. 16-60043

In re BRADLEY WESTON TAGGART,
Debtor,

TERRY W. EMMERT; KEITH JEHNKE;
SHERWOOD PARK BUSINESS CENTER, LLC,
Appellants,

v.

BRADLEY WESTON TAGGART,
Appellee.

DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
05/05/2016	1	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. SEND MQ: Yes. Setting schedule as follows: Fee due from Appellant Bradley Weston Taggart on 04/26/2016. Mediation Questionnaire due on 05/12/2016. Appellant Bradley Weston Taggart opening brief due 08/04/2016. Appellees Terry W. Emmert, Keith Jehnke, Shelley A. Lorenzen and Sherwood Park Business Center, LLC answering brief due

		09/06/2016. Appellant's optional reply brief is due 14 days after service of the answering brief. [9965524] (JN) [Entered: 05/05/2016 10:48 AM]
05/05/2016	2	Filed certificate of record on appeal. RT filed in DC: Not Applicable - BAP Appeal. [9965530] (JN) [Entered: 05/05/2016 10:50 AM]
		* * * * *
05/25/2016	10	Filed (ECF) - Bradley Weston Taggart and Appellant Bradley Weston Taggart Motion to consolidate cases 16-60032. 16-60033, 16-60039. 16-60040, 16-35402. Date of service: 05/25/2016. [9990756] [16-60032] (Berman, John) [Entered: 05/25/2016 12:23 PM]
05/26/2016	11	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL ON CROSS APPEAL. SEND MQ: Yes. Setting cross-appeal briefing schedule as follows: Mediation Questionnaire due on 06/02/2016. First cross appeal brief due 08/05/2016 for Bradley Weston Taggart. Second brief on cross appeal due 09/06/2016 for Terry W. Emmert, Keith Jehnke, Shelley A. Lorenzen and Sherwood Park Business Center, LLC. Third brief on cross appeal due 10/06/2016 for

		Bradley Weston Taggart . Optional reply brief on cross appeal is due 14 days from service of third brief on cross appeal. [9991975] [16-60043, 16-60032, 16-60042] (BG) [Entered: 05/26/2016 09:33 AM]
06/16/2016	12	Filed clerk order (Deputy Clerk: SM):Appellant Bradley Weston Taggart's motion to consolidate Appeal Nos. 16-60032, 16-60033, 16-60042, 16-60039, 16-60043 and 16-60040 (Docket No. [10]) is granted. The briefing schedule established on May 26, 2016 (Docket No. [11]) shall govern these consolidated appeals. Case No. 16-35402 will be assigned to the same panel that considers the merits of the above cases, but briefed separately. Furthermore, appellant Shelley A. Lorenzen is reminded of her obligation to pay the fees and submit the mediation questionnaires in Case Nos.16-60042 and 16-60039. [10017087] [16-60032, 16-60042, 16-60043, 16-60033, 16-60039, 16-60040, 16-35402] (WL) [Entered: 06/16/2016 09:27 AM]
06/22/2016	13	Filed (ECF) Appellee Shelley A. Lorenzen in 16-60032, 16-60033 motion for reconsideration of non-dispositive Clerk Order of 06/16/2016. Date of service: 06/22/2016.

[10024595] [16-60032, 16-60033, 16-60039, 16-60040, 16-60042, 16-60043] (Streinz, James) [Entered: 06/22/2016 10:11 AM]

06/30/2016 14 Filed clerk order (Deputy Clerk: SM):Appellee Shelley A. Lorenzen's motion for reconsideration (Docket No. [13]) of the Court's June 16, 2016 order (Docket No. [12]) is granted. Case No. 16-35402 shall be consolidated with the above appeals for briefing. The briefing schedule established on May 26, 2016 (Docket No. [11]) shall govern these consolidated appeals. Furthermore, Shelley Lorenzen is reminded of her obligation to pay the fees in Case No. 16-60039. [10034759] [16-60032, 16-60033, 16-60039, 16-60040, 16-60042, 16-60043, 16-35402] --[COURT UPDATE: To replace PDF: resent NDA - 06/30/2016 by HH] (WL) [Entered: 06/30/2016 09:20 AM]

* * * * *

07/20/2016 17 Submitted (ECF) First Brief on Cross-Appeal for review. Submitted by Appellant Bradley Weston Taggart in 16-60032, 16-60033. Date of service: 07/20/2016. [10056204] [16-60032, 16-35402, 16-60033, 16-60039, 16-60040, 16-60042, 16-

60043]--[COURT UPDATE: Attached corrected brief and updated docket text to reflect content of filing. 07/21/2016 by SLM] (Berman, John) [Entered: 07/20/2016 11:04 AM]

07/20/2016 18 Submitted (ECF) excerpts of record. Submitted by Appellant Bradley Weston Taggart in 16-60032, 16-60033. Date of service: 07/20/2016. [10056220] [16-60032, 16-35402, 16-60033, 16-60039, 16-60040, 16-60042, 16-60043]--[COURT UPDATE: Attached corrected excerpts of record.. 07/21/2016 by SLM] (Berman, John) [Entered: 07/20/2016 11:13 AM]

07/21/2016 19 Filed clerk order: The first brief on cross-appeal [17] submitted by Bradley Weston Taggart is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. Cover color: blue. The paper copies shall be printed from the PDF version of the brief created from the word processing application, not from PACER or Appellate CM/ECF. The Court has reviewed

		the excerpts of record [18] submitted by Bradley Weston Taggart. Within 7 days of this order, filer is ordered to file 4 copies of the excerpts in paper format, with a white cover. The paper copies must be in the format described in 9th Circuit Rule 30-1.6. [10058607] [16-60032, 16-35402, 16-60033, 16-60039, 16-60040, 16-60042, 16-60043] (KT) [Entered: 07/21/2016 02:45 PM]
		* * * * *
10/06/2016	29	Submitted (ECF) Second Brief on Cross-Appeal for review. Submitted by Appellee Shelley A. Lorenzen in 16-60032, Appellant Shelley A. Lorenzen in 16-35402, 16-60033, 16-60039, 16-60042. Date of service: 10/06/2016. [10152285] [16-60032, 16-35402, 16-60033, 16-60039, 16-60040, 16-60042, 16-60043]--[COURT UPDATE: Attached corrected brief. 10/07/2016 by SLM] (Schroer, Janet) [Entered: 10/06/2016 04:59 PM]
10/06/2016	30	Submitted (ECF) Second Brief on Cross-Appeal for review. Submitted by Appellants Terry W. Emmert, Keith Jehnke and Sherwood Park Business Center, LLC in 16-35402, Appellees Terry W. Emmert, Keith Jehnke and Sherwood

		Park Business Center, LLC in 16-60032, 16-60033, 16-60040, 16-60043. Date of service: 10/06/2016. [10152374] [16-60042, 16-35402, 16-60032, 16-60033, 16-60039, 16-60040, 16-60043]--[COURT UPDATE: Updated docket text to reflect content of filing. 10/07/2016 by SLM] (McMilan, Hollis) [Entered: 10/06/2016 11:53 PM]
10/07/2016	31	Submitted (ECF) supplemental excerpts of record. Submitted by Appellee Shelley A. Lorenzen in 16-60032, Appellant Shelley A. Lorenzen in 16-35402, 16-60033, 16-60039, 16-60042. Date of service: 10/07/2016. [10153431] [16-60032, 16-35402, 16-60033, 16-60039, 16-60040, 16-60042, 16-60043]--[COURT UPDATE: Attached corrected excerpts of record. 10/07/2016 by SLM] (Schroer, Janet) [Entered: 10/07/2016 02:20 PM]
10/07/2016	32	Filed clerk order: The second brief on cross-appeal [30] submitted by Terry W. Emmert, et al. is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification, attached to the end of each copy of the brief,

		that the brief is identical to the version submitted electronically. Cover color: red. The paper copies shall be printed from the PDF version of the brief created from the word processing application, not from PACER or Appellate CM/ECF. [10153557] [16-60032, 16-35402, 16-60039, 16-60040, 16-60042, 16-60043, 16-60033] (KT) [Entered: 10/07/2016 02:49 PM]
10/07/2016	33	Filed clerk order: The second brief on cross-appeal [29] submitted by Shelley A. Lorenzen is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. Cover color: red. The paper copies shall be printed from the PDF version of the brief created from the word processing application, not from PACER or Appellate CM/ECF. The Court has reviewed the supplemental excerpts of record [31] submitted by Shelley A. Lorenzen. Within 7 days of this order, filer is ordered to file 4 copies of the excerpts in paper format, with a white cover. The paper copies must be in

		the format described in 9th Circuit Rule 30-1.6. [10153880] [16-60032, 16-35402, 16-60039, 16-60040, 16-60042, 16-60043, 16-60033] (KT) [Entered: 10/07/2016 04:06 PM]
		* * * * *
11/05/2016	37	Submitted (ECF) Third Brief on Cross-Appeal for review. Submitted by - Bradley Weston Taggart and Appellant Bradley Weston Taggart in 16-60032, - Bradley Weston Taggart in 16-35402, 16-60033, 16-60039, 16-60040, 16-60042, 16-60043. Date of service: 11/05/2016. [10187521] [16-60032, 16-35402, 16-60033, 16-60039, 16-60040, 16-60042, 16-60043]--[COURT UPDATE: Updated docket text to reflect content of filing. 11/07/2016 by LA] (Berman, John) [Entered: 11/05/2016 02:18 PM]
11/07/2016	38	Filed clerk order: The third brief on cross-appeal [37] submitted by Bradley Weston Taggart is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically.

Cover color: yellow. The paper copies shall be printed from the PDF version of the brief created from the word processing application, not from PACER or Appellate CM/ECF. [10189143] [16-60032, 16-35402, 16-60033, 16-60039, 16-60040, 16-60042, 16-60043] (LA) [Entered: 11/07/2016 03:37 PM]

* * * * *

11/29/2016	44	Submitted (ECF) Cross-Appeal Reply Brief for review. Submitted by Appellee Shelley A. Lorenzen in 16-60032, Appellant Shelley A. Lorenzen in 16-35402, 16-60033, 16-60039, 16-60042. Date of service: 11/29/2016. [10214020] [16-60032, 16-35402, 16-60033, 16-60039, 16-60040, 16-60042, 16-60043] (Schroer, Janet) [Entered: 11/29/2016 01:58 PM]
11/29/2016	45	Filed clerk order: The cross-appeal reply brief [44] submitted by Shelley A. Lorenzen is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. Cover color: gray. The paper copies shall be

printed from the PDF version of the brief created from the word processing application, not from PACER or Appellate CM/ECF. [10214694] [16-60032, 16-35402, 16-60033, 16-60039, 16-60040, 16-60042, 16-60043] (LA) [Entered: 11/29/2016 05:16 PM]

* * * * *

12/16/2016	49	Submitted (ECF) Cross-Appeal Reply Brief for review. Submitted by Appellees Terry W. Emmert, Keith Jehnke and Sherwood Park Business Center, LLC in 16-60032, 16-60033, Appellants Terry W. Emmert, Keith Jehnke and Sherwood Park Business Center, LLC in 16-35402, 16-60040, 16-60043. Date of service: 12/16/2016. [10239211] [16-60032, 16-35402, 16-60033, 16-60039, 16-60040, 16-60042, 16-60043]-[COURT ENTERED FILING to replace incorrect entry [47].] (LA) [Entered: 12/19/2016 04:48 PM]
12/19/2016	50	Filed clerk order: The cross-appeal reply brief [49] submitted by Terry W. Emmert, et al. is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification, attached to the end

of each copy of the brief, that the brief is identical to the version submitted electronically. Cover color: gray. The paper copies shall be printed from the PDF version of the brief created from the word processing application, not from PACER or Appellate CM/ECF. [10239214] [16-60032, 16-35402, 16-60033, 16-60039, 16-60040, 16-60042, 16-60043] (LA) [Entered: 12/19/2016 04:50 PM]

* * * * *

09/29/2017 61 Filed (ECF) Appellant Shelley A. Lorenzen in 16-35402, Appellee Shelley A. Lorenzen in 16-60032, 16-60033, 16-60039, 16-60042 citation of supplemental authorities. Date of service: 09/29/2017. [10600051] [16-35402, 16-60032, 16-60033, 16-60039, 16-60040, 16-60042, 16-60043] (Schroer, Janet) [Entered: 09/29/2017 02:18 PM]

10/02/2017 62 Filed (ECF) Appellants Terry W. Emmert, Keith Jehnke and Sherwood Park Business Center, LLC in 16-35402, Appellees Terry W. Emmert, Keith Jehnke and Sherwood Park Business Center, LLC in 16-60032, 16-60033, 16-60040, 16-60043 citation of supplemental authorities. Date of service:

		10/02/2017. [10601302] [16-35402, 16-60032, 16-60033, 16-60039, 16-60040, 16-60042, 16-60043] (McMilan, Hollis) [Entered: 10/02/2017 11:02 AM]
10/03/2017	63	ARGUED AND SUBMITTED TO EDWARD LEAVY, RICHARD A. PAEZ and CARLOS T. BEA. [10604484] [16-35402, 16-60032, 16-60033, 16-60039, 16-60040, 16-60042, 16-60043] (KAD) [Entered: 10/03/2017 03:42 PM]
10/03/2017	64	Filed Audio recording of oral argument. **Note:** Video recordings of public argument calendars are available on the Court's website, at http://www.ca9.uscourts.gov/media/ [10606115] [16-35402, 16-60032, 16-60033, 16-60039, 16-60040, 16-60042, 16-60043] (KM) [Entered: 10/04/2017 02:43 PM]

* * * * *

10/05/2017	66	Filed (ECF) Appellant Bradley Weston Taggart in 16-60032, 16-60033 Motion to file supplemental excerpts of record. Date of service: 10/05/2017. [10607417] [16-60043, 16-35402, 16-60032, 16-60033, 16-60039, 16-60040, 16-60042]--[COURT UPDATE: Removed

		PDF of excerpts. Resubmitted using correct ECF filing type (see entry [67]). 10/05/2017 by RY] (Berman, John) [Entered: 10/05/2017 11:34 AM]
10/05/2017	67	Submitted (ECF) supplemental excerpts of record. Submitted by Appellee Bradley Weston Taggart in 16-35402, Appellant Bradley Weston Taggart in 16-60032, 16-60033, 16-60039, 16-60040, 16-60042, 16-60043. Date of service: 10/05/2017. [10607492] [16-35402, 16-60032, 16-60033, 16-60039, 16-60040, 16-60042, 16-60043]--[COURT ENTERED FILING to correct entry [66].] (RY) [Entered: 10/05/2017 11:56 AM]
04/16/2018	68	Filed order (EDWARD LEAVY, RICHARD A. PAEZ and CARLOS T. BEA): Appellant Bradley Weston Taggart's motion to file supplemental excerpts of record is GRANTED. [10837808] [16-35402, 16-60032, 16-60033, 16-60039, 16-60040, 16-60042, 16-60043] (AF) [Entered: 04/16/2018 11:19 AM]
		* * * * *
04/23/2018	70	FILED OPINION (EDWARD LEAVY, RICHARD A. PAEZ and CARLOS T. BEA) AFFIRMED. Judge: CTB Authoring. FILED

		AND ENTERED JUDGMENT. [10845887] [16-35402, 16-60032, 16-60033, 16-60039, 16-60040, 16-60042, 16-60043] (RMM) [Entered: 04/23/2018 06:59 AM]
		* * * * *
06/06/2018	78	Filed (ECF) Appellee Bradley Weston Taggart in 16-35402, Appellant Bradley Weston Taggart in 16-60032, 16-60033, 16-60039, 16-60040, 16-60042, 16-60043 petition for panel rehearing and petition for rehearing en banc (from 04/23/2018 opinion). Date of service: 06/06/2018. [10898287] [16-35402, 16-60032, 16-60033, 16-60039, 16-60040, 16-60042, 16-60043] (Geyser, Daniel) [Entered: 06/06/2018 09:52 AM]
06/11/2018	79	Submitted (ECF) Amicus brief for review and filed Motion to become amicus curiae. Submitted by The Honorable Eugene Wedoff (ret.), Professor Jack F. Williams, Professor Margaret Howard, and Adjunct Professor David R. Kuney. Date of service: 06/11/2018. [10903194] [16-35402, 16-60032, 16-60033, 16-60039, 16-60040, 16-60042, 16-60043] (Kuney, David) [Entered: 06/11/2018 09:02 AM]
		* * * * *

06/13/2018	82	Submitted (ECF) Amicus brief for review and filed Motion to become amicus curiae. Submitted by Prof. M. Jonathan Hayes. Date of service: 06/13/2018. [10908071] [16-60032, 16-35402, 16-60033, 16-60039, 16-60040, 16-60042, 16-60043] (Hayes, M.) [Entered: 06/13/2018 05:32 PM]
		* * * * *
06/18/2018	84	Submitted (ECF) Amicus brief for review and filed Motion to become amicus curiae. Submitted by National Consumer Bankruptcy Rights Center and National Association of Consumer Bankruptcy Attorneys. Date of service: 06/18/2018. [10912813] [16-60032, 16-35402, 16-60033, 16-60039, 16-60040, 16-60042, 16-60043]--[COURT UPDATE: Removed notice of appearance (unnecessary for amicus parties). 06/18/2018 by SLM] (Twomey, Tara) [Entered: 06/18/2018 03:18 PM]
		* * * * *
06/25/2018	86	Filed (ECF) Appellee Bradley Weston Taggart in 16-35402, Appellant Bradley Weston Taggart in 16-60032, 16-60033, 16-60039, 16-60040, 16-60042, 16-60043 citation of supplemental authorities. Date of

		service: 06/25/2018. [10921728] [16-35402, 16-60032, 16-60033, 16-60039, 16-60040, 16-60042, 16-60043] (Geyser, Daniel) [Entered: 06/25/2018 08:59 PM]
07/26/2018	87	Filed (ECF) Appellant Shelley A. Lorenzen in 16-35402, Appellee Shelley A. Lorenzen in 16-60032, 16-60033, 16-60039, 16-60042 citation of supplemental authorities. Date of service: 07/26/2018. [10956531] [16-35402, 16-60032, 16-60033, 16-60039, 16-60040, 16-60042, 16-60043] (Streinz, James) [Entered: 07/26/2018 02:26 PM]
09/07/2018	88	Filed order (EDWARD LEAVY, RICHARD A. PAEZ and CARLOS T. BEA): The panel has voted to grant each amicus curiae motion. The motions for leave to file amici curiae briefs are GRANTED. The panel has voted to deny Appellee's petition for panel rehearing. The panel has also voted to deny Appellee's petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on en banc rehearing. See Fed. R. App. P. 35(f). The petition for panel rehearing and the petition for rehearing en banc are DENIED. [11003998] [16-35402,

		16-60032, 16-60033, 16-60039, 16-60040, 16-60042, 16-60043] (AF) [Entered: 09/07/2018 09:06 AM]
		* * * * *
09/17/2018	92	MANDATE ISSUED.(EL, RAP and CTB) Costs taxed against Appellant in the amount of $65.20 (dkt #68), $56.00 (dkt#72). [11013198] [16-35402, 16-60032, 16-60033, 16-60039, 16-60040, 16-60042, 16-60043] (CW) [Entered: 09/17/2018 09:09 AM]
09/17/2018	93	AMENDED MANDATE ISSUED. EL, RAP and CTB to correct costs awarded - Costs are taxed against Taggart [11013398] [16-35402, 16-60032, 16-60033, 16-60039, 16-60040, 16-60042, 16-60043] (CW) [Entered: 09/17/2018 10:07 AM]

UNITED STATES BANKRUPTCY APPELLATE PANEL OF THE NINTH CIRCUIT

BAP No. OR-15-1119-JuKiF
BAP No. OR-15-1158-JuKiF

In re: BRADLEY WESTON TAGGART,
Debtor.

TERRY W. EMMERT; KEITH JEHNKE; SHERWOOD PARK BUSINESS CENTER, LLC; SHELLEY A. LORENZEN, Executor of the Estate of Stuart Brown,
Appellants,

v.

BRADLEY WESTON TAGGART,
Appellee.

DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
04/16/2015	1	Received notice of appeal filed in Bankruptcy Court on 04/13/2015, and copy of order on appeal. (PI) [Entered: 04/17/2015 04:31 PM]
		* * * * *
05/15/2015	5	Received from Bankruptcy Court copy of Appellant's DOR & SOI

		filed in Bk. Ct. 04/27/2015. (PI) [Entered: 05/15/2015 04:22 PM]
		* * * * *
05/15/2015	7	Received from Bankruptcy Court copy of Appellee's DOR filed in Bk. Ct. 05/04/2015. (PI) [Entered: 05/15/2015 04:34 PM]
		* * * * *
06/11/2015	10	Received from Bankruptcy Court notice of COR filed in Bk. Ct. 05/28/2015. (PI) [Entered: 06/11/2015 10:48 AM]
		* * * * *
11/16/2015	21	Filed (ECF) Attorney James Ray Streinz for Appellant Shelley A. Lorenzen in 15-1119, 15-1158's brief on appeal; served on 11/16/2015 email - Attorney for Appellee: Berman; Attorney for Appellants: McMilan, Streinz; US mail - Attorney for Appellee: Berman. [15-1119, 15-1158] (JRS) [Entered: 11/16/2015 04:44 PM]
11/16/2015	22	Filed (ECF) Attorney James Ray Streinz for Appellant Shelley A. Lorenzen in 15-1119, 15-1158's supplemental excerpts of record; served on 11/16/2015 email - Attorney for Appellee: Berman; Attorney for Appellants: McMilan, Streinz; US

mail - Attorney for Appellee: Berman. [15-1119, 15-1158] (JRS) [Entered: 11/16/2015 04:48 PM]

* * * * *

11/16/2015 26 Filed (ECF) Attorney Hollis K McMilan for Appellants Terry W. Emmert, Keith Jehnke and Sherwood Park Business Center, LLC in 15-1119, Attorney Hollis K McMilan for Appellants Terry W. Emmert, Sherwood Park Business Center, LLC and Keith Jehnke in 15-1158's brief on appeal; served on 11/16/2015 email - Attorney for Appellee: Berman; Attorney for Appellants: McMilan, Streinz. [15-1119, 15-1158] (HKM) [Entered: 11/16/2015 07:20 PM]

* * * * *

12/04/2015 30 Filed (ECF) Attorney Hollis K McMilan for Appellants Terry W. Emmert, Keith Jehnke and Sherwood Park Business Center, LLC in 15-1119, Attorney Hollis K McMilan for Appellants Terry W. Emmert, Sherwood Park Business Center, LLC and Keith Jehnke in 15-1158's joinder in **opening brief filed by Shelley A. Lorenzen** ; served on 12/04/2015 email - Attorney for Appellee: Berman; Attorney for Appellants: McMilan,

		Streinz. [15-1119, 15-1158]--[Edited 12/07/2015 by SS]--[Edited 12/07/2015 by SS] (HKM) [Entered: 12/04/2015 03:10 PM]
12/07/2015	31	Filed (ECF) Attorney Mr. John Berman, Esquire for Appellee Bradley Weston Taggart in 15-1119, 15-1158's brief on appeal; served on 12/07/2015 email - Attorney for Appellee: Berman; Attorney for Appellants: McMilan, Streinz; US mail - Attorney for Appellants: McMilan, Streinz. [15-1119, 15-1158] (JB) [Entered: 12/07/2015 09:58 AM]
12/21/2015	32	Filed (ECF) Attorney James Ray Streinz for Appellant Shelley A. Lorenzen in 15-1119, 15-1158's reply brief on appeal; served on 12/21/2015 email - Attorney for Appellee: Berman; Attorney for Appellants: McMilan, Streinz. [15-1119, 15-1158] (JRS) [Entered: 12/21/2015 02:53 PM]
12/21/2015	33	Filed (ECF) Attorney Hollis K McMilan for Appellants Terry W. Emmert, Keith Jehnke and Sherwood Park Business Center, LLC in 15-1119, Attorney Hollis K McMilan for Appellants Terry W. Emmert, Sherwood Park Business Center, LLC and Keith Jehnke in

		15-1158's reply brief on appeal; served on 12/21/2015 email - Attorney for Appellee: Berman; Attorney for Appellants: McMilan, Streinz. [15-1119, 15-1158] (HKM) [Entered: 12/21/2015 07:32 PM]
		* * * * *
03/17/2016	38	ARGUED AND SUBMITTED TO Jury, Kirscher and Faris. [15-1119, 15-1158] (FB) [Entered: 03/17/2016 01:05 PM]
		* * * * *
04/12/2016	40	CLOSED: Case closed: Reversed/Vacated;Terminated on the merits after oral hearing;Written, Unsigned, Published; Judges: Jury, Kirscher and Faris 04/12/2016 15-1119 Reversed; Opinion [15-1119, 15-1158] (VJ) [Entered: 04/12/2016 02:32 PM]
04/12/2016	41	FILED AND ENTERED JUDGMENT. [EOD] Date: 04/12/2016. Mandate to issue: 05/03/2016. [15-1119, 15-1158] (VJ) [Entered: 04/12/2016 02:34 PM]
		* * * * *
04/26/2016	44	Notice of Appeal to the 9th Circuit (ECF) filed by Attorney Mr. John Berman, Esquire for Appellee Bradley Weston Taggart in 15-1119, 15-1158; Fee status: Not Paid;

		Receipt No.:served on 04/26/2016 served by: hand delivery - Attorney for Appellee: Berman; email - Attorney for Appellants: McMilan, Streinz; US mail - Attorney for Appellants: McMilan, Streinz. [15-1119, 15-1158] (JB) [Entered: 04/26/2016 05:33 PM]
04/27/2016	45	Notice of Appeal to the 9th Circuit (ECF) **(with BAP Opinion attached)** filed by Attorney Mr. John Berman, Esquire for Appellee Bradley Weston Taggart in 15-1158, 15-1119; Fee status: Not Paid; Receipt No.:served on 04/26/2016 served by: hand delivery - Attorney for Appellee: Berman; email - Attorney for Appellants: McMilan, Streinz; US mail - Attorney for Appellants: McMilan, Streinz. [15-1158, 15-1119]--[Edited 04/27/2016 by MW] (JB) [Entered: 04/27/2016 09:06 AM]
		* * * * *
05/04/2016	49	REVERSED and VACATED MANDATE ISSUED to Bankruptcy Court Portland (ORP) and to Originating Bankruptcy Judge. [15-1119, 15-1158] (PI) [Entered: 05/04/2016 03:27 PM]
		* * * * *

05/11/2016	52	Notice of Appeal to the 9th Circuit (ECF) filed by Attorney James Ray Streinz for Appellant Shelley A. Lorenzen in 15-1119, 15-1158; Fee status: ; Receipt No.:served on 05/11/2016 served by: email - Attorney for Appellee: Berman; Attorney for Appellants: McMilan, Streinz; US mail - Attorney for Appellee: Berman; Attorney for Appellants: McMilan, Streinz. [15-1119, 15-1158] (JRS) [Entered: 05/11/2016 04:49 PM]
05/11/2016	53	Notice of Appeal to the 9th Circuit (ECF) filed by Attorney Hollis K McMilan for Appellants Terry W. Emmert, Keith Jehnke and Sherwood Park Business Center, LLC in 15-1119, Attorney Hollis K McMilan for Appellants Terry W. Emmert, Sherwood Park Business Center, LLC and Keith Jehnke in 15-1158; Fee status: Not Paid; Receipt No.:served on 05/11/2016 served by: email - Attorney for Appellee: Berman; Attorney for Appellants: McMilan, Streinz. [15-1119, 15-1158] (HKM) [Entered: 05/11/2016 07:13 PM]

* * * * *

05/31/2017	57	Designation of Record and/or Statement of Issues (ECF) filed for

		Court of Appeals by Attorney Hollis K McMilan for Appellants Terry W. Emmert, Keith Jehnke and Sherwood Park Business Center, LLC in 15-1119, Attorney Hollis K McMilan for Appellants Terry W. Emmert, Sherwood Park Business Center, LLC and Keith Jehnke in 15-1158; served on 05/31/2016 served by: email - Attorney for Appellee: Berman; Attorney for Appellants: McMilan, Streinz. [15-1119, 15-1158] (HKM) [Entered: 05/31/2016 03:48 PM]
06/01/2016	58	Designation of Record and Statement of Issues filed for Court of Appeals by Attorney Hollis K McMilan for Appellants Terry W. Emmert, Keith Jehnke and Sherwood Park Business Center, LLC in 15-1119, 15-1158; copy forwarded to 9th Circuit. [15-1119, 15-1158] (PI) [Entered: 06/01/2016 12:28 PM]

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF OREGON

No. 3:12-CV-00236-MO

BRADLEY WESTON TAGGART,
Appellant,

v.

STUART M. BROWN, et al.,
Appellees.

DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
02/09/2012	1	Bankruptcy Appeal and Record received from the US Bankruptcy Court. Scanned docket sheet attached. Documents numbered 1-82 received from the Bankruptcy Court. Filed by Bradley Weston Taggart. Appellants brief is due by 3/20/2012. (eo) (Entered: 02/09/2012)
		* * * * *
02/13/2012	84	Designation of Record on Appeal and Statement of Issues on Appeal. Filed by Bradley Weston Taggart. (eo) (Entered: 02/13/2012)
		* * * * *

02/15/2012	86	**OFFICIAL COURT TRANSCRIPT OF PROCEEDINGS FILED.** Evidentiary hearing held on November 14th, 2011 before Bankruptcy Judge Randall L. Dunn. Transcript review due on 5/15/12. (eo) (Entered: 02/15/2012)
03/18/2012	87	Appellants Brief . Filed by Bradley Weston Taggart. Appellees brief is due by 4/17/2012. (Attachments: # 1 Appendix, # 2 Appendix, # 3 Appendix, # 4 Appendix, # 5 Appendix, # 6 Appendix, # 7 Appendix, # 8 Appendix, # 9 Appendix, # 10 Appendix, # 11 Appendix, # 12 Appendix, # 13 Appendix, # 14 Appendix, # 15 Appendix, # 16 Appendix) (Petticord, Damon) (Entered: 03/18/2012)
04/17/2012	88	Response , Appellees Brief . Filed by Stuart M. Brown. Appellants reply brief is due by 5/1/2012. (Attachments: # 1 Exhibit Ex 1: Excerpt of Record, # 2 Exhibit Ex 2: In re Kozak) (Bellis, Tyler) (Entered: 04/17/2012)
04/17/2012	89	Response *Appellees Brief*. Filed by Terry W. Emmert, Keith Jehnke, Sherwood Park Business Center LLC. (Smith, Tyler) (Entered: 04/17/2012)

04/30/2012	90	Appellants Reply Brief . Filed by Bradley Weston Taggart. Matter is taken under advisement as of 5/4/2012. (Petticord, Damon) (Entered: 04/30/2012)
08/07/2012	91	OPINION AND ORDER. The Bankruptcy Courts decision is REVERSED AND REMANDED for further proceedings consistent with my ruling. Signed on 8/6/12 by Judge Michael W. Mosman. (dls) (Entered: 08/07/2012)
08/09/2012	92	Motion for Attorney Fees , Bill of Costs . Filed by All Plaintiffs. (Attachments: # 1 Exhibit Respondents' Petition for Fees and Costs) (Berman, John) (Entered: 08/09/2012)
08/13/2012	93	Judgment. Based upon my Opinion and Order 91 , IT IS HEREBY ORDERED AND ADJUDGED that the Bankruptcy Courts decision is REVERSED, and this case is REMANDED for further proceedings. Pending motions, if any, are DENIED AS MOOT. Signed on 8/10/12 by Judge Michael W. Mosman. (dls) (Entered: 08/13/2012)
08/16/2012	94	Response in Opposition to Motion for Attorney Fees Bill of Costs 92 .

		Filed by Stuart M. Brown. (Bellis, Tyler) (Entered: 08/16/2012)
08/16/2012	95	Objections to Motion for Attorney Fees Bill of Costs 92 . Filed by Terry W. Emmert, Keith Jehnke, Sherwood Park Business Center LLC. (Smith, Tyler) (Entered: 08/16/2012)
08/19/2012	96	Motion for Clarification . Filed by Bradley Weston Taggart. (Berman, John) (Entered: 08/19/2012)
08/24/2012	97	Motion for Reconsideration of Opinion 91 . Filed by Stuart M. Brown. (Streinz, James) (Entered: 08/24/2012)
08/24/2012	98	Memorandum in Support *of Motion for Reconsideration or Rehearing*. Filed by Stuart M. Brown. (Related document(s): Motion for Reconsideration 97 .) (Streinz, James) (Entered: 08/24/2012)
08/24/2012	99	Motion for Reconsideration of Opinion 91 , Judgment, 93 . Filed by Terry W. Emmert, Keith Jehnke, Sherwood Park Business Center LLC. (Attachments: # 1 Attachment Memorandum in Support of Motion for Reconsideration, # 2 Exhibit 1, # 3 Exhibit 2,

		# 4 Exhibit 3) (Smith, Tyler) (Entered: 08/24/2012)
08/27/2012	100	Response to Motion for Reconsideration of Opinion 91 97 , Motion for Reconsideration of Opinion 91 , Judgment, 93 99 . Filed by All Plaintiffs. (Berman, John) (Entered: 08/27/2012)
09/20/2012	101	**ORDER:** DENYING as premature Motion for Attorney Fees 92 ; GRANTING Taxation of Costs 92 in the amount of $2,145.25. DENYING AS MOOT Motion for Clarification 96 . DENYING Motion for Reconsideration 97 . DENYING Motion for Reconsideration 99 . Ordered by Judge Michael W. Mosman. (dls) (Entered: 09/20/2012)
09/20/2012	102	Notice of Appeal to the 9th Circuit Filing fee $455 collected; Agency Tracking ID 0979-3040859: . Filed by Terry W. Emmert, Keith Jehnke, Sherwood Park Business Center LLC. (Snee, Robert) (Entered: 09/20/2012)
		* * * * *
10/25/2012	106	Order DENYING Certificate of Appealability Denied regarding Notice of Appeal 102 . Signed on 10/25/12 by Judge Michael W.

		Mosman. (dls) (Entered: 10/25/2012)
06/16/2014	107	MANDATE of USCA for the 9th Circuit, **USCA # 12-35781**, re Notice of Appeal 102 . The appeal from the District Court is hereby DISMISSED, and the case is REMANDED for further proceedings. (Attachments: # 1 Final Order) (dsg) (Entered: 06/16/2014)
04/16/2018	108	Notice of Appeal to the 9th Circuit Filing fee $505 collected; Receipt No. 25R112CO: . Filed by Stuart M. Brown. (Streinz, James) (Entered: 05/11/2016)

UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF OREGON

No. 09-39216-rld7

In re: BRADLEY WESTON TAGGART, Debtor.

DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
11/04/2009	1	Chapter 7 Voluntary Petition, Fee Amount $299 (HEATHERMAN, PAUL) (Entered: 11/04/2009)
		* * * * *
11/23/2009	8	Amended Schedule(s) Filed By Debtor Bradley Weston Taggart (HEATHERMAN, PAUL) (Entered: 11/23/2009)
11/23/2009	9	Amended Schedule(s) Filed By Debtor Bradley Weston Taggart (HEATHERMAN, PAUL) (Entered: 11/23/2009)
		* * * * *
02/23/2010	14	Chapter 7 Trustee's Report of No Distribution: I, Michael B Batlan, having been appointed trustee of the estate of the above-named debtor(s), report that I have neither received any property nor paid

any money on account of this estate; that I have made a diligent inquiry into the financial affairs of the debtor(s) and the location of the property belonging to the estate; and that there is no property available for distribution from the estate over and above that exempted by law. Pursuant to Fed R Bank P 5009, I hereby certify that the estate of the above-named debtor(s) has been fully administered. I request that I be discharged from any further duties as trustee. Key information about this case as reported in schedules filed by the debtor(s) or otherwise found in the case record: This case was pending for 4 months. Assets Abandoned (without deducting any secured claims): $ 0.00, Assets Exempt: $ 4370.00, Claims Scheduled: $ 5784781.87, Claims Asserted: Not Applicable, Claims scheduled to be discharged without payment (without deducting the value of collateral or debts excepted from discharge): $ 5784781.87. (Re: Meeting of Creditors Set for 12/16/2009 at 09:30 AM at Bend National Guard Armory, Objection to Discharge Due

		02/16/2010.). Filed by Trustee Michael B Batlan. (Batlan, Michael) (Entered: 02/23/2010)
02/23/2010	15	Order Discharging Debtors; Order Discharging Trustee and Closing No Asset Estate and Certificate of Service (NOTE: If Any Related Adversary Proceeding Is Pending At Closing, Then All Further Adversary Entries Will Be On the Adversary Docket). (cmd) (Entered: 02/23/2010)
02/23/2010	16	Certificate of Notice Re: 15 Order Discharging Debtors; Order Discharging Trustee and Closing No Asset Estate and Certificate of Service (NOTE: If Any Related Adversary Proceeding Is Pending At Closing, Then All Further Adversary Entries Will Be On the Adversary Docket). (cmd). (Admin.) (Entered: 02/25/2010)
		* * * * *
06/20/2011	19	Motion to Reopen Chapter 7 Case Filed by Debtor Bradley Weston Taggart (PETTICORD, DAMON) (Entered: 06/20/2011)
		* * * * *
07/11/2011	23	Order Reopening Case. (cmd) (Entered: 07/11/2011)

07/13/2011	24	Motion For Contempt Filed by Debtor Bradley Weston Taggart (PETTICORD, DAMON) (Entered: 07/13/2011)
		* * * * *
08/15/2011	31	Supplemental Motion For Contempt Filed by Debtor Bradley Weston Taggart (PETTICORD, DAMON) (Entered: 08/15/2011)
08/15/2011	32	Supplemental Motion For Contempt Filed by Debtor Bradley Weston Taggart (PETTICORD, DAMON) (Entered: 08/15/2011)
		* * * * *
08/17/2011	34	Memorandum In Opposition to 24 Motion for Contempt Filed By Defendant Stuart M Brown (STREINZ, JAMES) (Entered: 08/17/2011)
08/23/2011	35	Hearing Held. Re: 24 Motion For Contempt Filed by Debtor Bradley Weston Taggart (PETTICORD, DAMON). (gjd) (Entered: 08/24/2011)
		* * * * *
10/17/2011	42	First Amended Motion For Contempt Filed by Debtor Bradley Weston Taggart (PETTICORD, DAMON) (Entered: 10/17/2011)

10/28/2011	43	Motion to Bifurcate Hearing on Debtor's Amended Motion for Contempt Filed by Creditor Stuart M Brown (STREINZ, JAMES) (Entered: 10/28/2011)
		* * * * *
10/31/2011	46	Order Granting 43 Motion to Bifurcate Hearing on Debtor's Amended Motion for Contempt filed by Creditor Stuart M Brown (cmd) (Entered: 10/31/2011)
		* * * * *
10/31/2011	50	Brief In Support of 42 Motion for Contempt Filed By Debtor Bradley Weston Taggart (PETTICORD, DAMON) (Entered: 10/31/2011)
		* * * * *
10/31/2011	53	Trial Memorandum Filed By Stuart M Brown, Terry W Emmert, Keith Jehnke re: 42 First Amended Motion For Contempt. (STREINZ, JAMES) Added link to related document. Modified on 11/1/2011 (rdl). (Entered: 10/31/2011)
10/31/2011	54	Hearing Held. Re: 43 Motion to Bifurcate Hearing on Debtor's Amended Motion for Contempt Filed by Creditor Stuart M Brown (STREINZ, JAMES), 44 Motion to Extend Time Deadline for Cutoff of Discovery Filed by Creditor Stuart

		M Brown (STREINZ, JAMES). (sfs) (Entered: 11/01/2011)
		* * * * *
11/14/2011	63	Hearing Held. Re: 42 First Amended Motion For Contempt Filed by Debtor Bradley Weston Taggart (PETTICORD, DAMON). (sfs) (Entered: 11/15/2011)
12/09/2011	64	Memorandum Opinion Re: 42 First Amended Motion For Contempt Filed by Debtor Bradley Weston Taggart (PETTICORD, DAMON) (cmd) (Entered: 12/09/2011)
		* * * * *
01/18/2012	67	Motion to Reconsider . Filed by Debtor Bradley Weston Taggart Re:42 First Amended Motion For Contempt Filed by Debtor Bradley Weston Taggart filed by Debtor Bradley Weston Taggart (PETTICORD, DAMON) (Entered: 01/18/2012)
1/23/2012	68	Order Denying Amended Motion to Hold Stuart M Brown, Terry W Emmert, Keith Jehnke and Sherwood Park Business Center, LLC in Contempt for Violating Discharge Injunction Under 11 USC 524 Re: 42 Amended Motion For Contempt (cmd) (Entered: 01/23/2012)

01/24/2012	69	Notice of Appeal. Filed by Debtor Bradley Weston Taggart RE:68 Order on Motion for Contempt (PETTICORD, DAMON). Appeal Designation Due: 02/7/2012. Modified on 1/24/2012 (pjk). Removed incorrect document link. (Entered: 01/24/2012)
		* * * * *
01/31/2012	74	Memorandum Opinion Re: 67 Motion to Reconsider . Filed by Debtor Bradley Weston Taggart Re:42 First Amended Motion For Contempt Filed by Debtor Bradley Weston Taggart filed by Debtor Bradley Weston Taggart (PETTICORD, DAMON) (cmd) (Entered: 01/31/2012)
01/31/2012	75	Order Denying 67 Motion to Reconsider (cmd) (Entered: 01/31/2012)
		* * * * *
02/07/2012	80	Respondents Motion for Attorney Fees and Costs Filed by Sherwood Park Business Center LLC, Terry W Emmert, Keith Jehnke (BROWN, STUART) (Entered: 02/07/2012)
		* * * * *
02/13/2012	85	Response Filed by Debtor Bradley Weston Taggart Re: 80 Respondents Motion for Attorney Fees and

		Costs Filed by Sherwood Park Business Center LLC, Terry W Emmert, Keith Jehnke, 81 COST BILL Filed by Terry W Emmert, Keith Jehnke, Sherwood Park Business Center LLC (PETTICORD, DAMON) (Entered: 02/13/2012)
02/13/2012	86	Designation of Record and Statement of Issues Filed by Debtor Bradley Weston Taggart RE: 69 Notice of Appeal filed by Debtor Bradley Weston Taggart (PETTICORD, DAMON). Modified on 2/13/2012 (pjk). Corrected: Added "Statement of Issues" to the docket text. (Entered: 02/13/2012)
		* * * * *
02/15/2012	89	Transcript re: Appeal of Evidentiary Hearing Held on November 14, 2011, and Notice of Filing Thereof, re: 42 First Amended Motion For Contempt Filed by Debtor Bradley Weston Taggart. Court Transcript Review due on 5/15/2012. (pjk) (Entered: 02/15/2012)
		* * * * *
02/22/2012	94	Reply and Supporting Document(s). Filed by Terry W Emmert, Keith Jehnke, Sherwood

		Park Business Center LLC Re: 85 Response Filed by Debtor Bradley Weston Taggart Re: 80 Respondents Motion for Attorney Fees and Costs Filed by Sherwood Park Business Center LLC, Terry W Emmert, Keith Jehnke, 81 COST BILL Filed by Terry W Emmert, Keith Jehnke, Sherwood Park Business Center LLC (BROWN, STUART) (Entered: 02/22/2012)
03/13/2012	95	Hearing Held. Re: 80 Respondents Motion for Attorney Fees and Costs. Filed by Sherwood Park Business Center LLC, Terry W Emmert, Keith Jehnke (BROWN, STUART). (gjd) (Entered: 03/14/2012)
03/15/2012	96	Abatement Order re: 80 Respondents Motion for Attorney Fees and Costs Filed by Sherwood Park Business Center LLC, Terry W Emmert, Keith Jehnke (BROWN, STUART) (cmd) (Entered: 03/15/2012)
		* * * * *
08/07/2012	105	Final Order By District Court Judge Michael W Mosman, Appeal on Civil Action Number: 3:12-cv-00236-MO, Reversed and Remanded Re: 68 Order Denying Amended Motion to Hold Stuart M

		Brown, Terry W Emmert, Keith Jehnke and Sherwood Park Business Center, LLC in Contempt for Violating Discharge Injunction Under 11 USC 524 Re: 42 Amended Motion For Contempt (cmd) (pjk) (Entered: 08/07/2012)
		* * * * *
10/11/2012	122	Abatement Order Re: 42 Motion For Contempt Violating Discharge Injunctions (Stuart M Brown, Terry W Emmert, Keith Jehnke and Sherwood Park Business Center LLC) (dtl) (Entered: 10/11/2012)
		* * * * *
06/16/2014	129	Order from Circuit Court Re: Appeal on Appellate Case Number: 1235781, DISMISSED and REMANDED to US District Court. 69 Notice of Appeal. Filed by Debtor Bradley Weston Taggart RE: 68 Order on Motion for Contempt. (pjk) (Entered: 07/01/2014)
		* * * * *
10/31/2014	144	Brief Motion for contempt Filed By Debtor Bradley Weston Taggart (BERMAN, JOHN) (Entered: 10/31/2014)
		* * * * *

10/31/2014	146	Memorandum Re: Filed By Creditor Stuart M Brown (STREINZ, JAMES) (Entered: 10/31/2014)
		* * * * *
10/31/2014	154	Memorandum In Opposition to Filed By Terry W Emmert, Keith Jehnke, Sherwood Park Business Center LLC (MCMILAN, HOLLIS) (Entered: 10/31/2014)
		* * * * *
11/07/2014	156	Hearing Held. Taken Under Advisement Re: 130 Correspondence Filed By Creditor Stuart M Brown. (bls) Additional attachment(s) added on 11/7/2014 (bls). (Entered: 11/07/2014)
		* * * * *
12/16/2014	158	Memorandum Opinion Re 42 First Amended Motion For Contempt Filed by Debtor Bradley Weston Taggart (dtl) (Entered: 12/16/2014)
12/17/2014	159	Order On 42 First Amended Motion For Contempt Filed by Debtor Bradley Weston Taggart. (dtl) (Entered: 12/17/2014)
		* * * * *
01/06/2015	163	Hearing Held. Re: 42 First Amended Motion For Contempt Filed by Debtor Bradley Weston

		Taggart. (gjd) (Entered: 01/07/2015)
		* * * * *
01/21/2015	166	Transcript of Hearing Held on November 7, 2014, and Notice of Filing Thereof, re: 130 Correspondence and Evidentiary Hearing Re Willful Issue. Court Transcript Review due on 4/21/2015. (pjk) (Entered: 01/21/2015)
		* * * * *
02/20/2015	169	Declaration of Damon J Petticord Re ATTORNEY FEES Filed By Debtor Bradley Weston Taggart (BERMAN, JOHN) (Entered: 02/20/2015)
02/20/2015	170	Brief Damages for contempt Filed By Debtor Bradley Weston Taggart (BERMAN, JOHN) (Entered: 02/20/2015)
02/20/2015	171	Declaration of John M Berman Re: ATTORNEY FEES Filed By Debtor Bradley Weston Taggart (BERMAN, JOHN)02/20/2015 (Entered: 02/20/2015)
02/20/2015	172	Memorandum Re: 42 Motion for Contempt Filed By Interested Party Shelley A. Lorenzen (STREINZ, JAMES) (Entered: 02/20/2015)

* * * * *

02/20/2015	175	Trial Memorandum Filed By Terry W Emmert, Keith Jehnke, Sherwood Park Business Center LLC (MCMILAN, HOLLIS) (Entered: 02/20/2015)
02/27/2015	176	Declaration of Damon Petticord Re: ATTORNEY FEES Filed By Damon J Petticord. (BERMAN, JOHN) (Entered: 02/27/2015)
02/27/2015	177	Evidentiary Hearing Held. Taken Under Advisement Re: 42 First Amended Motion For Contempt Filed by Debtor Bradley Weston Taggart. (gjd) (Entered: 02/27/2015)
03/03/2015	178	Correspondence Re: vacation of judgment Filed By Debtor Bradley Weston Taggart (BERMAN, JOHN) (Entered: 03/03/2015)
03/04/2015	179	Order to Vacate Judgment entered in Circuit Court of Washington Count, Case No. CO 85549CV re: 163 Hearing Held 177 Evidentiary Hearing Held re: 42 First Amended Motion For Contempt Filed by Debtor Bradley Weston Taggart. Modified on 3/5/2015 (pjk). Note: Added "entered in Circuit Court of Washington Count, Case No. CO

85549CV" for clarity. (Entered: 03/04/2015)

03/05/2015	180	Correspondence Re: Not Filing Objection Filed By Interested Party Shelley A. Lorenzen (STREINZ, JAMES) (Entered: 03/05/2015)
03/06/2015	181	Objection Filed by Terry W Emmert, Keith Jehnke, Sherwood Park Business Center LLC to #171 Declaration of John M Berman Re: Attorney Fees. #176 Declaration of Damon Petticord Re: ATTORNEY FEES Filed By Damon J Petticord. (MCMILAN, HOLLIS) Modified on 3/9/2015 (dtl). Added Link to Related Document. (Entered: 03/06/2015)

* * * * *

03/08/2015	183	Response Filed by Debtor Bradley Weston Taggart Re: 181 Objection Filed by Terry W Emmert, Keith Jehnke, Sherwood Park Business Center LLC (BERMAN, JOHN) #171 Declaration of John M Berman Re: Attorney Fees. #176 Declaration of Damon Petticord Re: ATTORNEY FEES Filed By Damon J Petticord. Modified on 3/9/2015 (dtl). Added Link to Related Document. (dtl). (Entered: 03/08/2015)

03/17/2015	184	Memorandum Opinion Re: 42 First Amended Motion For Contempt Filed by Debtor Bradley Weston Taggart (jbk) (Entered: 03/17/2015)
		* * * * *
03/26/2015	186	Order With Regard to Sanctions for Contempt Re: 184 Memorandum Opinion Re: 42 Motion For Contempt (dtl) (Entered: 03/26/2015)
		* * * * *
03/30/2015	188	Recover Judgment Against Terry W. Emmert, Keith Jehnke, Sherwood Park Business Center, LLC and Shelley Lorenzen, solely in her capacity as Executor of the Estate of Stuart Brown. (dtl) (Entered: 03/30/2015)
03/30/2015	-	Bankruptcy Case Closed. (NOTE: If any related adversary proceeding is pending at closing of this case, then all further adversary entries will be on the adversary docket.) (dtl) (Entered: 03/30/2015)
		* * * * *
04/13/2015	190	Notice of Appeal #1 and Optional Statement of Election to Bankruptcy Appellate Panel. (Attachments: # 1 Judgment) Filed by Terry W Emmert, Keith Jehnke, Sherwood Park Business Center

		LLC RE: 188 Judgment (MCMILAN, HOLLIS). Appeal Designation Due: 04/27/2015. (Entered: 04/13/2015)
		* * * * *
04/19/2015	196	Motion To Stay Pending Appeal . Filed by Terry W Emmert, Keith Jehnke, Sherwood Park Business Center LLC Re:190 Notice of Appeal #1 and Optional Statement of Election to Bankruptcy Appellate Panel. (Attachments: # 1 Judgment) Filed by Terry W Emmert, Keith Jehnke, Sherwood Park Business Center LLC RE: 188 Judgment (MCMILAN, HOLLIS). Appeal Designation Due: 04/27/2015. filed by Creditor Terry W Emmert, Creditor Keith Jehnke, Creditor Sherwood Park Business Center LLC (MCMILAN, HOLLIS) (Entered: 04/19/2015)
04/20/2015	197	Response Filed by Debtor Bradley Weston Taggart Re: 196 Motion To Stay Pending Appeal . Filed by Terry W Emmert, Keith Jehnke, Sherwood Park Business Center LLC Re:190 Notice of Appeal #1 and Optional Statement of Election to Bankruptcy Appellate Panel. (Attachments: # 1 Judgment) Filed by Terry W Emmert, Keith

Jehnke, Sherwood Park Business Center LLC RE: 188 Judgment (MCMILAN, HOLLIS). Appeal Designation Due: 04/27/2015. filed by Creditor Terry W Emmert, Creditor Keith Jehnke, Creditor Sherwood Park Business Center LLC (BERMAN, JOHN) (Entered: 04/20/2015)

* * * * *

04/23/2015 201 Hearing Held. Re: 192 Motion to Extend Time for Appeal Under 8002c Filed by Interested Party Shelley A. Lorenzen. (gjd) (Entered: 04/23/2015)

* * * * *

04/24/2015 204 Hearing Held. Re: 196 Motion To Stay Pending Appeal . Filed by Terry W Emmert, Keith Jehnke, Sherwood Park Business Center LLC Re:190 Notice of Appeal #1 and Optional Statement of Election to Bankruptcy Appellate Panel. (Attachments: # 1 Judgment) Filed by Terry W Emmert, Keith Jehnke, Sherwood Park Business Center LLC RE: 188 Judgment (MCMILAN, HOLLIS). Appeal Designation Due: 04/27/2015. filed by Creditor Terry W Emmert, Creditor Keith Jehnke, Creditor Sherwood Park Business Center

LLC, 197 Response Filed by Debtor Bradley Weston Taggart Re: 196 Motion To Stay Pending Appeal . Filed by Terry W Emmert, Keith Jehnke, Sherwood Park Business Center LLC Re:190 Notice of Appeal and Optional Statement of Election to Bankruptcy Appellate Panel. (Attachments: # 1 Judgment) Filed by Terry W Emmert, Keith Jehnke, Sherwood Park Business Center LLC RE: 188 Judgment (MCMILAN, HOLLIS). Appeal Designation Due: 04/27/2015. filed by Creditor Terry W Emmert, Creditor Keith Jehnke, Creditor Sherwood Park Business Center LLC. (gjd) (Entered: 04/24/2015)

* * * * *

04/27/2015 206 Designation of Record and Statement of Issues on Appeal Filed by Terry W Emmert, Keith Jehnke, Sherwood Park Business Center LLC RE: 190 Notice of Appeal #1 and Optional Statement of Election filed by Creditor Terry W Emmert, Creditor Keith Jehnke, Creditor Sherwood Park Business Center LLC (MCMILAN, HOLLIS). Modified on 4/28/2015 (pjk) to mod-

ify text to include "Statement of Issues on Appeal". (Entered: 04/27/2015)

* * * * *

04/27/2015 208 Motion To Stay Pending Appeal and Supporting Document(s). Filed by Terry W Emmert, Keith Jehnke, Sherwood Park Business Center LLC Re:196 Motion To Stay Pending Appeal. Filed by Terry W Emmert, Keith Jehnke, Sherwood Park Business Center LLC Re:190 Notice of Appeal #1 and Optional Statement of Election to Bankruptcy Appellate Panel. (Attachments: # 1 Judgment) Filed by Terry W Emmert, Keith Jehnke, Sherwood Park Business Center LLC RE: 188 Judgment (MCMILAN, HOLLIS). Appeal Designation Due: 04/27/2015. filed by Creditor Terry W Emmert, Creditor Keith Jehnke, Creditor Sherwood Park Business Center LLC filed by Creditor Terry W Emmert, Creditor Keith Jehnke, Creditor Sherwood Park Business Center LLC (MCMILAN, HOLLIS) (Entered: 04/27/2015)

* * * * *

04/29/2015 210 Response Filed by Debtor Bradley Weston Taggart Re: 208 Motion To

Stay Pending Appeal and Supporting Document(s). Filed by Terry W Emmert, Keith Jehnke, Sherwood Park Business Center LLC Re:196 Motion To Stay Pending Appeal. Filed by Terry W Emmert, Keith Jehnke, Sherwood Park Business Center LLC Re:190 Notice of Appeal #1 and Optional Statement of Election to Bankruptcy Appellate Panel. (Attachments: # 1 Judgment) Filed by Terry W Emmert, Keith Jehnke, Sherwood Park Business Center LLC RE: 188 Judgment (MCMILAN, HOLLIS). Appeal Designation Due: 04/27/2015. filed by Creditor Terry W Emmert, Creditor Keith Jehnke, Creditor Sherwood Park Business Center LLC filed by Creditor Terry W Emmert, Creditor Keith Jehnke, Creditor Sherwood Park Business Center LLC (BERMAN, JOHN) (Entered: 04/29/2015)

* * * * *

04/29/2015 213 Hearing Held. Re: 208 Motion To Stay Pending Appeal and Supporting Document(s). Filed by Terry W Emmert, Keith Jehnke, Sherwood Park Business Center LLC Re:196 Motion To Stay Pending Appeal . Filed by Terry W Emmert, Keith Jehnke, Sherwood Park Business

Center LLC Re:190 Notice of Appeal #1 and Optional Statement of Election to Bankruptcy Appellate Panel. (Attachments: # 1 Judgment) Filed by Terry W Emmert, Keith Jehnke, Sherwood Park Business Center LLC RE: 188 Judgment (MCMILAN, HOLLIS). Appeal Designation Due: 04/27/2015. filed by Creditor Terry W Emmert, Creditor Keith Jehnke, Creditor Sherwood Park Business Center LLC filed by Creditor Terry W Emmert, Creditor Keith Jehnke, Creditor Sherwood Park Business Center LLC. (gjd) (Entered: 04/30/2015)

* * * * *

04/30/2015	215	Order Granting 196 Motion To Stay Pending Appeal . filed by Creditor Terry W Emmert, Creditor Keith Jehnke, Creditor Sherwood Park Business Center LLC,, Granting 208 Motion To Stay Pending Appeal and Supporting Document(s). filed by Creditor Terry W Emmert, Creditor Keith Jehnke, Creditor Sherwood Park Business Center LLC (pjk) (Entered: 04/30/2015)
05/04/2015	216	Designation of Record Filed by Debtor Bradley Weston Taggart RE: 190 Notice of Appeal #1 and

		Optional Statement of Election filed by Creditor Terry W Emmert, Creditor Keith Jehnke, Creditor Sherwood Park Business Center LLC (BERMAN, JOHN). (Entered: 05/04/2015)
		* * * * *
05/12/2015	220	Notice of Appeal #2 and Optional Statement of Election to Bankruptcy Appellate Panel. Filed by Interested Party Shelley A. Lorenzen RE: 188 Judgment (STREINZ, JAMES). Appeal Designation Due: 05/26/2015. (Entered: 05/12/2015)
		* * * * *
05/26/2015	223	Transcript re: Appeal, of Hearing Held on February 27, 2015, and Notice of Filing Thereof, Re: 42 First Amended Motion For Contempt Filed by Debtor Bradley Weston Taggart. Court Transcript Review due on 8/24/2015. (ljr) Modified on 8/25/2015 (pjk). No requests for redaction; removed viewer restrictions. (Entered: 05/26/2015)
05/26/2015	224	Designation of Record, Statement of Issues Filed by Interested Party Shelley A. Lorenzen RE: 220 Notice of Appeal #2 and Optional

		Statement of Election filed by Interested Party Shelley A. Lorenzen (STREINZ, JAMES). Modified on 5/27/2015 (pjk) for clarity re: Appeal #2. (Entered: 05/26/2015)
		* * * * *
05/28/2015	228	Unopposed Motion for Court Certification for Direct Appeal *to the Ninth Circuit Court of Appeals* Filed by Interested Party Shelley A. Lorenzen (STREINZ, JAMES). (Entered: 05/28/2015)
		* * * * *
06/01/2015	230	Order Granting Motion for Court Certification for Direct Appeal to Circuit Court (Related Doc #) 228 Unopposed Motion for Court Certification for Direct Appeal *to the Ninth Circuit Court of Appeals* Filed by Interested Party Shelley A. Lorenzen. (pjk) (Entered: 06/01/2015)
		* * * * *
09/16/2015	237	Order from Circuit Court Re: Direct Appeal on Appellate Case Number: 15-80115, Denying. (ljr) (Entered: 09/21/2015)

Below is an order of the Court.

/s/ Randall L. Dunn
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
District of Oregon

Case No. 09-39216-rld7

IN RE BRADLEY WESTON TAGGART, xxx-xx-0766
Other names used by debtor: DUMPTRAX, LLC

Debtor(s)

CHAPTER 7 ORDER RE: DISCHARGE; AND ORDER DISCHARGING TRUSTEE AND CLOSING CH. 7 "NO ASSET" CASE

FILED: February 23, 2010

It appearing that on 11/4/09 a bankruptcy petition was filed by the debtor(s); timely complaints filed pursuant to 11 USC §523(a) could be pending and the court could still order that any affected debt is nondischargeable, however no complaint objecting to the debtor's discharge pursuant to 11 USC §727 was timely filed (or such complaint was filed, and after due notice and hearing, was not sustained); each timely filed written reaffirmation agreement was either rescinded or not approved by the court; the trustee

has filed a report of no assets and performed all other administrative duties as required; and therefore,

IT IS ORDERED that:

1. The debtor(s) shall be granted a discharge under §727 of Title 11, United States Code (the Bankruptcy Code).

2. The trustee is discharged as trustee of the debtor's estate; this case is closed; and the court shall retain jurisdiction over any adversary proceeding pending at the time of closure.

EXPLANATION OF BANKRUPTCY DISCHARGE IN A CHAPTER 7 CASE

This court order grants a discharge to the person(s) named as a debtor. It is not a dismissal of the case and it does not determine how much money, if any, the trustee will pay to creditors.

Collection of Discharged Debts Prohibited. The discharge prohibits any attempt to collect from a debtor a debt that has been discharged. For example, a creditor is not permitted to contact a debtor by mail, phone, or otherwise, to file or continue a lawsuit, to attach wages or other property, or to take any other action to collect a discharged debt from the debtor. (If applicable there are also special rules that protect certain community property owned by the debtor's spouse, even if that spouse did not file a bankruptcy case.) A creditor who violates this order can be required to pay damages and attorney's fees to the debtor.

However, a creditor may have the right to enforce a valid lien, such as a mortgage or security interest, against the debtor's property after the bankruptcy, if that lien was not avoided or eliminated in the bankruptcy case.

Also, a debtor may voluntarily pay any debt that has been discharged.

Debts that are Discharged. The Chapter 7 discharge order eliminates a debtor's legal obligation to pay a debt that is discharged. Most, but not all, types of debts are discharged if the debt existed on the date the bankruptcy case was filed. (If this case was begun under a different chapter of the Bankruptcy Code and converted to Chapter 7, the discharge applies to debts owed when the bankruptcy case was converted.)

Debts that are Not Discharged. Some of the common types of debts which are not discharged in a Chapter 7 bankruptcy case are:

a. Debts for most taxes;

b. Debts incurred to pay nondischargeable taxes;

c. Debts that are for domestic support obligations, or debts to a spouse or former spouse for property settlement;

d. Debts for most student loans;

e. Debts for most fines, penalties, forfeitures, or criminal restitution obligations;

f. Debts for personal injuries or death caused by the debtor's operation of a motor vehicle, vessel, or aircraft while intoxicated;

g. Some debts which were not properly listed by the debtor;

h. Debts the bankruptcy court specifically has decided or will decide in this case are not discharged;

i. Debts for which the debtor has given up the discharge protections by signing a reaffirmation agreement in

compliance with the Bankruptcy Code requirements for reaffirmation of debts; and

j. Debts owed to certain pension, profit sharing, stock bonus, other retirement plans, or to the Thrift Savings Plan for federal employees for certain types of loans from these plans.

This information is only a general summary of the bankruptcy discharge. There are exceptions to these general rules. Because the law is complicated, you may want to consult an attorney to determine the exact effect of the discharge in this case.

IN THE CIRCUIT COURT OF THE
STATE OF OREGON
FOR THE COUNTY OF WASHINGTON

No. CO 85540 CV

SHERWOOD PARK BUSINESS CENTER, LLC,
an Oregon limited liability company,

Plaintiff,

vs.

BRAD TAGGART, an individual, BT OF SHERWOOD, LLC,
an Oregon limited liability company, and
JOHN BERMAN, an individual,

Defendants.

BT OF SHERWOOD, LLC, an Oregon limited liability company and JOHN HOFFARD OF SHERWOOD, LLC,
an Oregon limited liability company,

Counterclaim Plaintiffs,

vs.

TERRY W. EMMERT, an individual, KEITH JEMNKE,
an individual and SHERWOOD PARK BUSINESS CENTER,
LLC, an Oregon limited liability company,

Counterclaim Defendants.

OBJECTION TO JUDGMENT

INTRODUCTION

The reason that no General Judgment has been submitted is because as a matter of federal law no attorney fees or costs, pre-or post-bankruptcy, can be assessed against Mr. Taggart. Thus, the payment to him for the 25% interest must be without any such offsets, as explained infra.

Mr. Brown, who submitted this form of General Judgment, is fully aware that he is asking the Court to participate in a violation of federal law. Moreover, he has been told that any attempt to seek such fees or costs will result in a legal proceeding against the responsible parties in the Bankruptcy Court for violation of Mr. Taggart's discharge. It is up to this Court to decide how it wishes to respond when an attorney asks it to violate federal law without even advising this Court that is being asked to do so.

The form of judgment is also incorrect with regard to the terms of purchase and with regard to who are the prevailing parties. The undersigned has prevailed on all of the claims involving him, by both SPBC and by Messrs, Jehnke and Emmert, and he is entitled to recover his costs, disbursements and attorney fees as the prevailing party.

SPBC improperly sued him, and he was granted summary judgment at an early stage in this case, Messrs. Jehnke and Emmert also sued him, and those claims were also dismissed. Any suggestion to the contrary is, again, misleading this Court.

DETAILS OF OBJECTIONS TO JUDGMENT

These comments are in the order in which the language appears in the judgment.

A. The proposed judgment states as follows, with the objectionable part italicized, at page 3 lines 3-6"

> "The purchase price shall be the fair market value of the Company multiplied by Taggart's 25% membership interest, *less any unpaid post-bankruptcy petition attorney fees, costs and prevailing party fees which might be assessed against Taggart pursuant to ORCP 68 and ORS Chapter 20 and any necessary proceedings in bankruptcy court or this court.*"

As you may recall, Mr. Taggart concluded that he had assigned his interest and received fair value. He considered himself to have no interest in this proceeding and asked at the commencement of the trial to be dismissed. He did not appear at trial or participate in any manner.

Under those facts it is a violation of federal law for anyone to attempt to obtain any award of attorney fees against him. Mr. Taggart has received a discharge in bankruptcy, and that discharge includes any liability arising from a continuation of this proceeding.

SPBC insists that he continues to be the owner of the 25% interest, even though Mr. Taggart made no such claim and did not engage in the litigation. SPBC and Messrs. Jehnke and Emmert cannot force the continuation of this litigation on Taggart, and then assert a claim for attorney fees and costs against him.

That was the express holding in *In re Ybarra*, 424 F3d 1018 (2005), a copy of which is attached to this brief. It held that where a litigant actively asserts claims in litigation post-petition, only then can he be assessed post-petition attorney fees, overruling *In re Ybarra*, 295 BR 609 (USBAP, 2002), which held that even then attorney fees could not be awarded.

As explained in the Ninth Circuit's decision, and there are numerous other cases that have so held in other jurisdictions, when one is discharged in bankruptcy from liability, including liability associated with prepetition litigation, the fact that the litigation continues without any involvement by the discharged debtor means that no attorney fees or costs on account of those claims can be asserted against the discharged debtor. His right to a fresh start is preeminent.

The relevant fact is whether the discharged debtor asserted claims in this case post-petition. He did not. Here Taggart did not do so, but actively sought to be dismissed from the case.

In addition, the reference to deducting from the payment to be made to Taggart any fees or costs in this or the Bankruptcy Court is improper, not only for the above reasons, but also because it suggests that this court has some authority to assess attorney fees incurred in some unspecified later bankruptcy court proceeding, or some other proceeding in this court, and to deduct them from what Taggart is owed, for which there is absolutely no basis. Rather, Messrs. Jehnke and Emmert have no legal basis for their claims. They just don't want to pay for what they say they want to buy. That is not an option.

The italicized portion of the judgment quote above violates federal law and must be stricken.

B. The proposed judgment improperly provides that the interest rate is to be *3.25% from the date of closing, does not provide for payments to be caught up and improperly asks that the proceeds be withheld.*

Messrs. Jehnke and Emmert seek to enforce Paragraph 12 of the Operating Agreement. A copy is included

with this Objection as the Court may not have easy access to it. To define the purchase one has to know:

A. When Mr. Taggart stopped being an owner and became a seller;

C. The date of valuation;

D. When interest starts;

E. The interest rate;

F. When payments are to be made; and

G. To whom the payments are to be made.

These are the answers to those questions;

1. Messrs. Jehnke and Emmert contend that Mr. Taggart stopped being an owner as of January 1, 2008, (See proposed General Judgment, ¶ 1(3). Under their contention, that is the event giving rise to their right to purchase his interest.

2. The election to purchase had to occur within 120 days of that date. (Operating Agreement, ¶ 12.3). Messrs. Emmert and Jehnke contend that they made their election at the appropriate time, so they are deemed to have elected within 120 days of January 1, 2008, or no later than April 29, 2008.

3. The closing was required to be within 90 days of their election. (Operating Agreement, ¶ 12.5) Therefore, the closing is deemed to have occurred no later than July 28, 2008.

4. Therefore, the valuation must be as of approximately July 28, 2008. That is the latest possible date for closing.

5. Interest commences from the date of the election to purchase, which is no later than April 28, 2008. (Operating Agreement, ¶ 12.5)

6. The interest rate is the prime rate of Wells Fargo on the date of the event that gives rise to the election to purchase. That is said to be January 1, 2008. (Operating Agreement, ¶ 12.5) The prime rate on that date was 7.5%. (Wells cargo's prime rate is the same as the national prime rate. A copy of the relevant prime rate schedule is attached.)

7. The down payment of 20% was due no later than the latest possible closing date, which was July 28, 2008. Then 60 monthly payments are due starting one month after closing. Therefore, the first monthly payment was due no later than August 28, 2008. (Operating Agreement, ¶ 12.5) Thus, the down payment and more than half of the total purchase price, plus interest, are currently due.

8. The payments must be paid to the seller. There is no provision in the Operating Agreement for any escrow account. Messrs. Jehnke and Emmert want to be the owners of the 25% that Mr. Taggart had owned. They have to pay for it, and they have to pay Mr. Taggart for it. Otherwise, Mr. Taggart would be entitled to the rights of an owner, which Messrs. Emmert and Jehnke have said terminated on January 1, 2008.

H. The judgment fails to recognize that Berman prevailed as to all claims involving him. He is entitled as a prevailing party to costs, disbursements and attorney fees. BT of Sherwood prevailed as to some claims and not as to other claims, also. It is suggested that paragraph 3

of the judgment be modified with a "." after prejudice, followed by the following: "Any claim for attorney fees, costs and prevailing party fees shall be determined in accordance with ORCP 68."

Respectfully submitted,

/s/ John M. Berman
John M. Berman, Pro Per and On Behalf of
BT of Sherwood, LLC

[1] IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF WASHINGTON

Case No. C085540CV

SHERWOOD PARK BUSINESS CENTER LLC, an Oregon limited liability company,

Plaintiff,

vs.

BRAD TAGGART, an individual, BT OF SHERWOOD LLC, an Oregon limited liability company, and JOHN BERMAN, an individual

Defendants.

BT OF SHERWOOD LLC, an Oregon limited liability company, and JOHN HOFFARD OF SHERWOOD LLC, an Oregon limited liability company,

Counterclaim Plaintiffs,

vs.

TERRY W. EMMERT, an individual, KEITH JEHNKE, an individual, and SHERWOOD PARK BUSINESS CENTER LLC, an Oregon limited liability company,

Counterclaim Defendants.

TERRY EMMERT, an individual, KEITH JEHNKE, an individual, and SHERWOOD PARK BUSINESS CENTER LLC, an Oregon limited liability company,

Counterclaim Plaintiffs,

vs.

[2] BT OF SHERWOOD LLC, an Oregon limited liability company, JOHN HOFFARD OF SHERWOOD LLC, an Oregon limited liability company, and JOHN BERMAN, an individual,

Counterclaim Defendants.

TRANSCRIPT OF PROCEEDINGS
HEARING RE: JUDGMENT (5-2-11)

TRANSCRIPT OF PROCEEDINGS

BE IT REMEMBERED, that on the 2nd day of May, 2011, the above-entitled matter came on for Hearing before the HONORABLE DONALD R. LETOURNEAU, a Circuit Court Judge.

* * * * *

[6]MR. BROWN: * * * [W]hat I'll do is I'll take a look at the two judgments side by side and I will tell the court where we have disputes.

THE COURT: Thank you.

MR. BROWN: The first area is paragraph two where we talk about he engaged in wrongful conduct and then we go through what the wrongful conduct was and he should be expelled. And they take out all the wrongful conduct. I kind of like my language, but I think that's up to the court as to how the court wants to handle that.

THE COURT: Very well.

MR. BROWN: The second issue is our paragraph four, their paragraph three. What I did with ours is – is two

things that they have not done. I took the language from the LLC agreement and I included an offset if we file a petition for miss – a petition for attorney fees with regard to Mr. Taggart's post-discharge attorney fees. Because we feel he did come back into the case, so that is something we're not arguing here today.

We haven't decided whether we want to file for attorney fees or not and, in all likelihood, we probably won't, but experience with Mr. Berman indicates [7] that out of an abundance of caution we want an order that that's an offset now, because in the past Mr. Berman in another case came in with an attorney fee lien in between the judgment and the attorney fee and has claimed that he is now superior to the attorney fees and that there's no direct offset before his attorney's fees are satisfied.

So, we would simply want that language if we do file for attorney fees or costs against Mr. Taggart individually that that would be an offset to what we would owe him. The Oregon statutes provide for that, but we want to make sure that we don't have this problem that happened in another case.

THE COURT: Just out of curiosity, what statute provides for an offset?

MR. BROWN: Pardon?

THE COURT: Just out of curiosity, what statute provides for an offset?

MR. BROWN: It's – it was – it's OR – we cited it in our response, Your Honor. The – when you're expelling, you can have offsets –

THE COURT: Okay.

MR. BROWN: – for damages that are caused by the – it's 63.209.

THE COURT: Okay. Thank you.

MR. BROWN: Additionally, interest rate. The [8] LLC agreement states specifically it's the interest state of the Wells Fargo Bank. It's not the prime rate of – of the United States government, it's Wells Fargo bank. We did have testimony at trial.

I mean, I don't think he's expelled until Your Honor says he's expelled in a judgment which would mean that we would probably use the interest rate in effect on that day of Wells Fargo Bank. I don't know how the court would want to handle that, but it's – I would think that would be what we would use.

The other part of his proposed judgment that I did not like was paragraph four. Mr. Taggart, in fact, might be indebted to taxing authorities, but I would think that his membership interest might be part of his bankruptcy estate. We can't pay or Mr. Berman can't pay. The bankruptcy trustee would have to pay. That's why we put the language in our judgment about paying to an escrow account approved by the court until further order of this court or another court with jurisdiction.

For example, the Bankruptcy Court, if the bankruptcy trustee decides that he is entitled to distribute the proceeds as an asset of Mr. Taggart's bankruptcy estate of the sale of the membership interest. I don't think we have to get into that as to whose entitled to it. I think that is for the bankruptcy [9] trustee to decide and the Bankruptcy Court to decide. I certainly wouldn't – I certainly would strongly object on behalf of my client's tending deposit to Mr. Berman's trust account. The attorney fee lien issue has created problems in the past and I just think it ought

to be the bankruptcy trustee that makes the decision. If, in fact, the bankruptcy trustee is – is the person of interest to receive the proceeds; if not, the court can decide at that point how to set up an escrow account.

THE COURT: Thank you. I'm sorry.

MR. BROWN: Other than that, I think we're okay. We did have a – a change. Mr. Berman indicated that any party seeking costs or attorney fees shall do so in accordance with Rule 68 and that's fine with us.

* * * * *

[19] RULING

I – the language about post-judgment attorney fees that Mr. Brown has is acceptable to the court. It's clear that he's made it clear that and the law is clear that he can't get pre-judge – pre-bankruptcy attorneys fees and he's not seeking that. He's talking about post – I said judgment, it's post – that's not the right word. Post-bankruptcy filing. So, the words he used in the judgment were acceptable to me.

* * * * *

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF WASHINGTON

Case No. CO 85540CV

SHERWOOD, PARK BUSINESS CENTER, LLC, an Oregon limited liability company,

Plaintiffs,

v.

BRAD TAGGART, an individual, BT OF SHERWOOD, LLC, an Oregon limited liability company, and JOHN BERMAN, an individual,

Defendants.

BT OF SHERWOOD, LLC, an Oregon limited liability company and JOHN HOFFARD OF SHERWOOD, LLC an Oregon limited liability company,

Counterclaim Plaintiffs,

v.

TERRY W. EMMERT, an individual, KEITH JEHNKE, an individual and SHERWOOD PARK BUSINESS CENTER, LLC, an Oregon limited liability company,

Counterclaim Defendants.

TERRY W. EMMERT, an individual, KEITH JEHNKE, an individual and SHERWOOD PARK BUSINESS CENTER, LLC, an Oregon limited liability company,

Counterclaim Plaintiffs,

v.

BT OF SHERWOOD, LLC, an Oregon limited liability company, JOHN HOFFARD OF SHERWOOD, LLC an Oregon limited liability company, and JOHN BERMAN, an individual,

Counterclaim Defendants.

PLAINTIFF'S AND COUNTERCLAIM DEFENDANTS EMMERT AND JEHNKE'S PETITION FOR ATTORNEY FEES AND COSTS

The undersigned attorney represents, under penalty of perjury, the following facts offered in support of an award to Plaintiff and Counterclaim Defendants of reasonable and necessary attorney fees and costs and disbursements against Defendants Taggart and BT of Sherwood LLC (BT) are true:

1. Plaintiff Sherwood Park Business Center LLC (SPBC) and Counterclaim Defendants Emmert and Jehnke are entitled to recover attorney fees against BT of Sherwood LLC (BT) pursuant to the following facts and statutes:

ORS 20.096 provides:

> "In any action or suit in which a claim is made based on a contract that specifically provides that attorney fees and costs incurred to enforce the provisions of the contract shall be awarded to one of the parties, the party that prevails on the claim shall be entitled to reasonable attorney fees in addition to costs and disbursements, without regard to whether the prevailing party is the party specified in the contract and without

> regard to whether the prevailing party is a party to the contract."

In the present case, the Operating Agreement of SPBC contains the following clause:

> "In the event of any suit or action or arbitration proceeding to enforce or interpret any provision of this Agreement (or which is based on this Agreement), the prevailing party shall be entitled to recover, in addition to other costs, reasonable attorney fees in connection with such suit, action, arbitration, and in any appeal therefrom." Op. Ag. §13.6.

The evidence at trial was that Mr. Taggart was a member of SPBC. Mr Taggart assigned his membership interest to BT. BT claimed that it owned the interest, and it claimed that John Berman had later acquired a 100 percent ownership interest in BT. SPBC brought claims against Mr. Taggart and BT arising out of the transfer of interest, all of which were based upon the Operating Agreement and the claim of Taggart and BT that the transfer of the interest was proper. The claims brought against BT were based upon BT's contention that it was the assignee of Mr. Taggart's Membership interest in SPBC, and SPBC's contention that the assignment was ineffective, that Mr. Taggart remained the holder of the interest, and that Mr. Taggart should be expelled from membership. SPBC prevailed on its claim: Mr. Taggart's assignment of his interest to BT was declared ineffective, and Mr. Taggart was expelled as a member of SPBC.

BT also brought counterclaims against SPBC and Counterclaim Defendants Emmert and Jehnke alleging that each breached his fiduciary duties to BT. In a separate claims, BT requested that SPBC

be dissolved and that BT be awarded damages. BT alleged that it had the right to bring these claims because it was the assignee of Mr. Taggart's membership interest. All of BT's Counterclaims against SPBC, Mr. Emmert, and Mr. Jehke were dismissed. ORS 20.097(1) provides:

> "In any action or suit on a contract by an assignee of any right under that contract, the maker of that contract and the plaintiff in the action or suit on that contract shall be severally liable for any attorney fees and costs that may be awarded to the defendant in the action."

Because BT's right to bring counterclaims was based on the alleged assignment from Mr. Taggart, both BT (as assignee of Mr. Taggart's) and Mr. Taggart (as a "maker" of the Operating Agreement) would, therefore, be "severally liable" for the attorney fees incurred by SPBC, in defending against BT's claims, Mr. Emmert and Mr. Jehnke in defending against the First, Second, Third, and Fourth Counterclaims of BT, as well as any attorney fees incurred by SPBC with respect to its initial Claims for Relief concerning the invalidity of Taggart's transfer of his membership interest ORS 20.097(i) would also appear to impose liability on Mr. Taggart for fees and costs caused by BT's prosecution of its claims subsequent to November 4, 2009.

Ironically, BT's liability for attorney fees for the claims it made against Mr. Emmett and Mr. Jehnke has already been litigated. After filing this action in Washington County, BT filed another Complaint in Multnomah County against Mr. Emmert and Mr. Jehnke making the same allegations as those contained in its Counterclaims in this litigation. The Multnomah County Circuit Court dismissed the second lawsuit (on the basis of ORCP

21.A(3)), and awarded attorney fees under ORS 20.096 to Mr. Emmert and Mr. Jehnke. BT appealed that decision, but then dismissed its appeal and paid the award. A copy of the Court's award is attached to the Declaration of Mr. Brown that is filed herewith. We request that the Court take Judicial Notice of the file in the Multnomah County litigation for purposes of this request for attorney fees.

Mr. Taggart filed for bankruptcy on the day that trial was to begin in 2009. His liability for fees would be limited to fees incurred after he filed for bankruptcy on November 4, 2009; and then if he voluntarily inserted himself into ongoing litigation that had been started pre-petition. The Ninth Circuit, in *Ybarra v. Ybarra*, 424 F.3d 1018 (9th Circuit, 2005) stated:

> "In light of the foregoing discussion, we reaffirm that claims for attorney fees and costs incurred post-petition are not discharged where post-petition, the debtor voluntarily "return[s] to the fray." *See Siegel*, 143 F.3d at 533-34. Whether attorney fees and costs incurred through the continued prosecution of litigation initiated pre-petition may be discharged depends on whether the debtor has taken affirmative post-petition action to litigate a prepetition claim and has thereby risked the liability of these litigation expenses." Id. at 1026.

In the present case, Mr. Taggart filed a Declaration and Motion for Protective Order in the litigation on April 6 and 9, 2010, and a Motion to Dismiss on May 18, 2019, the first day of trial. Mr. Taggart also personally appeared at the hearing at the Form of Judgment, and Mr. Berman made arguments on his behalf. By doing so, Mr. Taggart voluntarily "returned to the fray" and tool "affirmative post-petition action to litigate to prepetition claim". He

has, therefore, risked the liability of the attorney fees and costs requested by the SPBC, Mr. Emmert and Mr. Jehnke. He also would be liable – post petition – for fees incurred as a result of BT's Counterclaims under ORS 20.097(1).

* * * * *

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF WASHINGTON

Case 3:12-cv-00236-MO

SHERWOOD PARK BUSINESS CENTER, LLC, an Oregon limited liability company,

Plaintiff,

vs.

BRAD TAGGART, an individual, BT OF SHERWOOD, LLC, an Oregon limited liability company, and JOHN BERMAN, an individual,

Defendants.

BT OF SHERWOOD, LLC, an Oregon limited liability company and JOHN HOFFARD OF SHERWOOD, LLC, an Oregon limited liability company,

Counterclaim Plaintiffs,

vs.

TERRY W. EMMERT, an individual, KEITH JEHNKE, an individual and SHERWOOD PARK BUSINESS CENTER, LLC, an Oregon limited liability company,

Counterclaim Defendants.

DEFENDANT BRAD TAGGART'S OBJECTIONS TO ATTORNEY FEES AND COSTS

I filed for bankruptcy just before the trial because I wanted to be done with Emmert, Jehnke and this entire

matter. I believed then, and I believe now, that BT of Sherwood, LLC, owned by Mr. Berman, owns a 25% interest in SPBC. The Court has ruled to the contrary.

Not only have I not sought to be involved with this litigation at any time, especially after my bankruptcy, but I sought to be dismissed prior to the recent trial. I note that Emmert and Jehnke contend that I "joined the fray" by seeking a protective order. Emmert and Jehnke wanted to harass me further after I filed bankruptcy by seeking to depose me yet again. The first deposition took a day. When there was no ruling on my request for a protective order, I went to the deposition.

The person who showed up to depose me was not Emmert or Jehnke's attorney, but Ken Bauman, a friend of Emmert who was not his or Jehnke's attorney in the case. Any legal fees incurred by Emmert and Jehnke in this matter were mostly not in litigation with me, because I did not have much to do with this case.

It is submitted that when I received a discharge in bankruptcy, that discharge protected me from any liability such as being sought in this matter, both for attorney fees and for any costs.

It is important to point out that I sought nothing in this litigation. I did not ask to be the owner of a 25% interest in SPBC. The fact that this Court ordered me to accept ownership is not because I sought such a result, for I did not.

I heard the Court say that it had a dislike for me personally at the last hearing. I have never testified before this Court. I had my interest sold long before this litigation to a fellow who was a tenant. Mr. Emmert refused to approve the sale when it came time to close, and the transaction failed. I also tried to sell my interest to Mr. Jehnke

and his partners before this litigation and before Mr. Berman became involved. Mr. Jehnke indicated he was willing, but it is my understanding that Mr. Emmert would not agree.

I understand that the Court has its opinion of me. I made the mistake of entering into joint business interests with Terry W. Emmert in 2003 and have been paying the price ever since. I am certainly not alone.

When I presented my claims concerning Mr. Emmert's conduct to a jury in Evergreen West Business Center, LLC v. Emmert, the jury agreed with my recollection of the facts and found against Mr. Emmert for breach of fiduciary duty and even awarded punitive damages against him for his conduct. He has since appealed the judgment in that case.

I have made other mistakes. I filed bankruptcy for a fresh start, not a fresh argument, especially with Mr. Emmert and Mr. Jehnke.

I respectfully submit that it would be a violation of my bankruptcy discharge to claim attorney fees or costs against me with regard to this matter.

/s/
Brad Taggart, Pro Per

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF WASHINGTON

Case No. CO 85540CV

SHERWOOD PARK BUSINESS CENTER, LLC, an Oregon limited liability company,

Plaintiff,

vs.

BRAD TAGGART, an individual, BT OF SHERWOOD, LLC, an Oregon limited liability company, and JOHN BERMAN, an individual,

Defendants.

BT OF SHERWOOD, LLC, an Oregon limited liability company and JOHN HOFFARD OF SHERWOOD, LLC, an Oregon limited liability company,

Counterclaim Plaintiffs,

vs.

TERRY W. EMMERT, an individual, KEITH JEHNKE, an individual and SHERWOOD PARK BUSINESS CENTER, LLC, an Oregon limited liability company,

Counterclaim Defendants.

BRAD TAGGART'S HEARING MEMORANDUM WITH REGARD TO REQUEST FOR FEES AGAINST HIM

This document responds to the arguments raised by Mr. Brown in the brief he just filed against Mr. Taggart:

1. Listing the right to recover attorney fees in the bankruptcy schedule.

Mr. Taggart was obligated to list any actual or potential assets of which he was aware when he filed his bankruptcy schedules so that the trustee could administer those assets. The right to fees in this case was a potential asset. The trustee did not seek to recover the fees, and neither has Mr. Taggart. In fact Mr. Taggart asked the undersigned to have him dismissed from the litigation. Mr. Taggart has never sought to recover attorney fees in this case.

2. Allegedly purporting to pursue any rights in this case.

Mr. Taggart did not appear during the trial of this matter. He appeared at the time that the case was originally set for trial and advised the undersigned that morning, and not before, that he was filing bankruptcy that day, which he did. The undersigned was not involved in Mr. Taggart's bankruptcy, or its timing, and was not even consulted.

A primary reason that Mr. Taggart filed bankruptcy was not to have any further involvement with this litigation, or to have anyone make a claim for attorney fees against him in this litigation. Mr. Taggart never returned to this litigation voluntarily and never pursued any claims in this litigation. Again, he affirmatively asked to be dismissed from it.

It is also important to point out that the Court's decision in this case did not result from any pleadings or claims filed by Mr. Taggart. Mr. Taggart was not a willing participant in this litigation, and pursuing him for attorney fees violates his discharge.

For the Court's information, this matter is currently before the United States Bankruptcy Court for the District of Oregon, and copies of those pleadings are attached hereto. This Court may wish to defer ruling until the United States Bankruptcy Court for the District of Oregon has ruled whether seeking these fees violates Mr. Taggart's discharge.

Respectfully submitted,

/s/ John M. Berman
John M. Berman, OSB No. 72024
Attorney for Brad Taggart

[1] IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF WASHINGTON

Case No. CO 85540CV

SHERWOOD PARK BUSINESS CENTER, LLC, an Oregon limited liability company,

Plaintiffs,

v.

BRAD TAGGART, an individual, BT OF SHERWOOD, LLC, an Oregon limited liability company, and JOHN BERMAN, an individual,

Defendants.

BT OF SHERWOOD, LLC, an Oregon limited liability company and JOHN HOFFARD OF SHERWOOD, LLC, an Oregon limited liability company,

Counterclaim Plaintiffs,

v.

TERRY W. EMMERT, an individual, KEITH JEHNKE, an individual, and SHERWOOD PARK BUSINESS CENTER, LLC, an Oregon limited liability company,

Counterclaim Defendants.

TERRY W. EMMERT, an individual, KEITH JEHNKE, an individual, and SHERWOOD PARK BUSINESS CENTER, LLC, an Oregon limited liability company,

Counterclaim Plaintiffs,

v.

BT OF SHERWOOD, LLC, an Oregon limited liability company, JOHN HOFFARD OF SHERWOOD, LLC, an Oregon limited liability company, and JOHN BERMAN, an individual,

Counterclaim Defendants.

Proceedings from Audio
August 1, 2011

---

* * * * *

[8] MR. BROWN: * * * The other two matters are the attorney fees requests against BT of Sherwood, LLC, and the attorney fees requested against Mr. Taggart individually.

* * * * *

[9] [W]e have requested attorney fees against Mr. Taggart, 20.096 for Sherwood Park; 20.097 for Emmert and Jehnke on the basis that Mr. Taggart was the assignor of a membership interest in Sherwood Park that carried with it the attorney fee clause from the operating agreement: And under 20.097, the assignor is jointly and severally responsible with the assignee for any attorney fees awarded.

In the present case, Mr. Taggart has gone through bankruptcy. He has been discharged of liabilities. However, the Ninth Circuit has said that if he voluntarily reenters the case or voluntarily participates in the case going forward, then he's liable for attorney fees.

In this present case, he moved for a protective order post-discharge, He filed a motion to dismiss post-dis-

charge. But most importantly, he had an answer, affirmative defenses, and counterclaims on [10] record. The counterclaims asked for an award of attorney fees.

That pleading was never dismissed. And, in fact, as we've indicated to the Court, in his bankruptcy pleadings, Mr. Taggart claimed as an asset attorney fees that might be awarded to him in the litigation, evidencing his nonabandonment of his claims for attorney fees.

That clearly indicates that he was participating in the litigation going forward, because at no time did he move to dismiss that answer, affirmative defenses, and his counterclaim.

Mr. Berman, in a document filed this morning with the Court, states that, in fact, Mr. Taggart asked the undersigned to have him dismissed from the litigation. Well, that was not true. He asked for dismissal of the claims against him on the grounds that those monetary claims were discharged by his bankruptcy. And those claims were not pursued by the – either the counterclaim defendants or the plaintiff in the case.

He then states: Mr. Taggart has never sought to recover attorney fees in this case. That is a factual statement that is simply not true. In his counterclaim, Mr. Taggart says: Defendant Taggart is [11] entitled to recover his attorney fees herein, pursuant to Section 13.6 of plaintiff's operating agreement and pursuant to ORS 20.105.

So with regard to Mr. Taggart, we believe that his maintenance of this claim, throughout the litigation, subjects him to attorney fees.

We have broken out those attorney fees, and actually we have run the attorney fees requested for Mr. Taggart from February 23rd of 2011. I think technically we could

have gone back to November 5th, when he filed his Chapter 7. But we went back to the date of his discharge, the date the discharge document was filed.

And according to those attorney fees, and we've provided the Court with the detailed breakdown, Sherwood Park is claiming $44,691.50: and defendants Emmert and Jehnke, counterclaim defendants, $40,163. And those are the amounts that they incurred in defending this case and in prosecuting the case subsequent to February 23rd of 2011.

Now, Mr. Taggart pleaded affirmative defenses that advanced the same claims made by ST in the regular litigation. So it was – it would be impossible to allocate between the litigation involving BT and the litigation involving Mr. Taggart. So we have simply [12] asked for the entire amount subsequent to February 23rd with regard to Mr. Taggart. And, of course, the amount awardable by the Court is discretionary.

* * * * *

[19] * * * Q [MR. BERMAN] Okay. Now, let's talk about this case, involving Sherwood Park. What role did this litigation play in your deciding to file Chapter 7 bankruptcy?

A [MR. TAGGART] Well, this – this is what just pushed me over the brink.

Q And what – and could you explain that?

A Well, I was totally out of money. This was a ridiculous lawsuit, in my opinion, from the get-go. We had had an opportunity to sell my interest to a tenant that is now a tenant in that project.

Everybody agreed that Mr. Emmert – there was just no way that I was going to ever be able to work out anything reasonable with these guys. It was just going to continue on. I was tired of it. It had been going on for years.

[20] MR. BROWN: Your Honor, at this point, I'm going to object to the testimony of Mr. Taggart, since this is testimony that, if its relevant, should have been given at trial. We tried the case without any of this.

THE COURT: I'll let his answer stand that he's given so far. You may ask your next question.

BY MR. BERMAN:

Q And after you filed bankruptcy, did you intend to participate in any manner in this lawsuit?

A No.

Q And with regard to the listing of a claim for attorneys' fees in the bankruptcy, were you obligated to list that?

A I was.

Q And did you – have you – after you filed bankruptcy, have you done anything to attempt to assert that right?

A Absolutely not.

Q And did you ever wish, after filing bankruptcy, to have any further involvement with this case?

A No involvement at all.

Q And did you ask me to have you dismissed from this case?

[21] A I did.

* * * * *

[39] MR. BERMAN: Yes. Now let's talk about Mr. Taggart and legal fees.

THE COURT: Very well.

MR. BERMAN: The law is very clear that [40] when he filed bankruptcy, he's entitled to be discharged from any potential liability in this case unless he affirmatively comes back into the case and requests and continues his litigation in the case.

And all the cases talk about where the party has claims that they've asserted. And they say that if you've – after the bankruptcy, if you go back and reassert those claims, you are then, from that point forward, liable for legal fees if you lose, just as if you've started the case at that time.

But if you don't do that, then you are not liable for anything. And that's very clear in the – that is why Mr. Brown talks about the fact that there was a pleading for attorneys' fees. And there was a pleading for attorneys' fees, which Mr. Taggart abandoned. He was obligated to list it in his bankruptcy schedules because it was a potential asset.

Neither he nor the trustee ever asserted any right. And in fact, it's clear, and since you're taking notice of it, that I told you at the beginning of the trial that Mr. Emmert – Mr. Taggart was not going to appear, did not wish to be involved in the case, and wished to be dismissed from it.

He didn't affirmatively become involved at all. He wanted nothing further to do with it. That's [41] why he filed bankruptcy.

The Court, in a sense – you know, he's been forced back into this case. He's not voluntarily done it. The Court ruled you still own this asset. But that's nothing that he

did. And none of these fees that they're seeking are anything that he participated in or had anything to do with him. He just ended up as a matter of your outcome.

If I gave you an analogy to it, to explain the situation, if somebody has a promissory note and a deed of trust on some property and they go through bankruptcy, the personal liability disappears but the mortgage on the property continues. And that's, in a sense, where we are. You can't – he's got no personal liability for any attorneys' fees. He's done nothing.

With regard to his request for a protective order, he was subpoenaed as a witness to be re-deposed. And as a witness, he's entitled to ask for protective order. He's been deposed once before, and the Court never ruled on it.

And he ended up going to the deposition and the deposition wasn't even held by any attorney for Mr. – for any of the parties here. It was held by Mr. Ken Bauman, who is Mr. Emmert's friend. And this ex-assistant U.S. Attorney who works with Mr. Emmert. [42] And it was just harassment to make him go do it.

So you find that he's – he's here involuntarily. He didn't want this interest. It's forced on him. And under the Bankruptcy Code, he can't be liable for fees. He hasn't done anything to have them imposed on him.

And I gave the Court a hearing memo. He has petitioned the Bankruptcy Court to resolve it and to – the proper procedure under the Bankruptcy Code, to file a motion for contempt. He can't file a separate lawsuit. It's a motion for contempt.

It's before the Bankruptcy Court, the judge who was his bankruptcy judge. There's going to be a telephone argument on August 23rd. And then the Court will set it for argument. And the Court will look at all of these facts and decide it.

I suppose you – well, my obligation to be candid with the Court, of course, you can decide it now that there's no right to fees under the Bankruptcy Code. You can defer and wait and hear what the bankruptcy judge says. Those are the two choices.

The Bankruptcy Code does not say you can't decide. It just says that if you impose fees and the Bankruptcy Code says you couldn't, it digs the hole deeper. So that's the situation of Mr. Taggart.

* * * * *

[48] THE COURT: * * * Anything else you want to add?

MR. BROWN: Just that Mr. Taggart knew what he was doing. He – he admits that he signed his – his motion to dismiss himself. He read it before he signed it. It doesn't dismiss his answer and counterclaim. He listed it in his bankruptcy as an asset. He intended to go forward with it. And dollars to doughnuts, if he had prevailed, he'd be here asking you for attorney fees.

And given the state of the pleadings, Your Honor would probably have to give it to him. So we believe we're entitled to the attorney fees we've requested. We talked about 20.105. We also asked for an enhanced prevailing party fee, but those are all in our –

THE COURT: Thank you. I'm going to take it under advisement for two reasons. One, I have $5,000 an hour of people squirming around and harassing me by poking their head in. But also I'm not – I'm not [49] familiar,

which isn't too shocking, with the abandonment theory vis-a-vis bankruptcy cases and attorneys fees, since it doesn't come up in state court hardly at all.

MR. BROWN: It's an abandonment –

THE COURT: I understand. So I need to read the case law a little bit on that one point and figure out how it fits into our facts. And I appreciate – I just don't know the answer because I – it just never comes up in state court, that issue.

* * * * *

DON LETOURNEAU (503) 846-3418
JUDGE

CIRCUIT COURT OF OREGON
TWENTIETH JUDICIAL DISTRICT
Washington County Courthouse
150 N. First Ave. Suite 490
Hillsboro, Oregon 97124
TTY: (503) 846-4863
FAX: (503) 846-8141

August 11, 2011

Jeffery M. Edelson
Markowitz, Herbold, Glade & Mehlaf, P.C.
1211 SW Fifth Avenue, Suite 3000
Portland, Oregon 97204-3730

John M. Berman
Attorney-at-Law
7175 SW Bleland Street, Suite 210
Tigard, Oregon 97223

Stuat M. Brown
Wiles Law Group
510 SW 5th Avenue
Portland, Oregon 97204

Re: Sherwood Park Business Center, LLC v. Brad Taggart et al.
Washington County Case No. C08-5540CV, attorney fee ruling

Counsel:

Pursuant to *McCarthy v. Oregon Freeze Dry, Inc.*, 327 Or 84 (1998), the court identifies the following relevant facts and criteria on which the court relies in determining an award of attorney fees/costs.

The court finds the hourly rate and time expended by counsels for the moving parties are reasonable. It also finds the costs sought are reasonable. Unless noted otherwise below, the bases for the awards cited by the moving parties are appropriate.

Taggart

The court notes that *In re Ybarra*, 424 F3d 1018 (9th Cir. 2005) holds that the trial court has power to award post-petition attorney fees against a debtor who continues to pursue litigation post-petition that had been begun pre-petition. This is consistent with the federal case law the court reviewed.

Taggart filed an answer that was file stamped October 28, 2009. The answer contained a counterclaim for attorney fees based on Section 13.6 of the Operating Agreement.

The answer also sought to have plaintiff's claim to be dismissed against him. This was consistent with the oral Motion to Dismiss raised at time of trial. Taggart never abandoned his counterclaim for attorney fees. Rather be continued to pursue his position post-petition that the plaintiff's claim against him be dismissed which, if successful, would have led to Taggart having a contractual right to obtain attorney fees.

The court awards attorney fees in favor of BT of Sherwood in the amount sought at oral argument. My notes are difficult to decipher but I believe that amount was $44,691.50. (It may be accurately $44,611.50 as the ten column is the one I am having trouble reading.) Costs and disbursements sought as well as the standard prevailing party fee are also appropriate.

BT of Sherwood

When the court inquired at oral argument, what the moving parties' response was to the citation to *AutoLend, IAP, Inc. v. Auto Depot, Inc.*, 170 Or App 135 (2000), Mr. Edelson proferred that he thought the case has been overruled by the revision of a statute. Counsel subsequently directed the court to ORS 20.083 with the lawyerly comment that his "enthusiasm for its applicability has diminished." The court treats this as an implied concession on this point.

BT of Sherwood was not a party to the contract. Taggard never successfully assigned his interest to BT of Sherwood. BT of Sherwood cannot be liable for attorney fees based on the contract. See, *HLHZ Investments, LLC v. Plaid Pantries, Inc.*, 2007 WL 31229985 (D. Or. 2007) (No. CIV. 06-797-KI)

ORS 20.105/Enhanced Prevailing Party Fee

The moving parties have a high burden to obtain attorney fees under this statute. They have not met that burden. The court concurs with the analysis in Mr. Berman's memorandum.

Likewise no enhanced prevailing party fee is warranted.

Prevailing Party Fees/Costs and Disbursements

There was a scant discussion of this in the briefs.

Sherwood Park Business Center is the prevailing party with respect to Brad Taggart (as noted above) and BT of Sherwood and is entitled to the standard prevailing party fee as well as costs and disbursements sought.

The court finds than neither Terry Emmert or Keith Jehnke nor BT of Sherwood are prevailing parties with respect to each other. It also relies expressly on ORCP 68B which grants the court discretion ("unless the court otherwise directs") vis a vis costs and disbursements.

In argument, neither Sherwood Park Business Center nor John Berman expressly sought prevailing party fee relating to the summary judgment in which both parties agreed and therefore the court concluded that Mr. Berman was not a partner in the Sherwood Park Business Center. No prevailing party fee is awarded. The court also expressly relies on ORCP 68B, cited above, vis a vis costs and disbursements

ORCP 17

As noted at the oral argument, the hearing with the respect to ORCP 17 was abated by the stipulation of the parties.

Conclusion

Mr. Brown shall prepare an order and money award consistent with this opinion.

Respectfully,

/s/ Donald R. Letourneau
Donald R. Letourneau
Circuit Court Judge

COURT OF APPEALS OF OREGON

C085540CV; A150753

SHERWOOD PARK BUSINESS CENTER, LLC,
an Oregon limited liability company,

Plaintiff-Respondent
Cross-Appellant,

v.

BRAD TAGGART, an individual; and BT OF SHERWOOD,
LLC, an Oregon limited liability company,

Defendants-Appellants
Cross-Respondents,

and

JOHN BERMAN, an individual,

Defendant.

BT OF SHERWOOD, LLC,
an Oregon limited liability company,

Counterclaim Plaintiff-Appellant
Cross-Respondent,

and

JOHN HOFFARD OF SHERWOOD, LLC,
an Oregon limited liability company,

Counterclaim Plaintiff,

v.

TERRY W. EMMERT, an individual; KEITH JEHNKE,
an individual; and SHERWOOD PARK BUSINESS CENTER,
LLC, an Oregon limited liability company,

Counterclaim Defendants-Respondents Cross-Appellants.

TERRY W. EMMERT, et al.,

Counterclaim Plaintiffs,

v.

BT OF SHERWOOD, LLC; et al.,

Counterclaim Defendants.

Argued and Submitted June 4, 2013.

Decided Nov. 26, 2014.

OPINION

Before ORTEGA, Presiding Judge, and HADLOCK, Judge, and NORBY, Judge pro tempore.

HADLOCK, J.

Brad Taggart and BT of Sherwood, LLC (BT) (collectively, "defendants") appeal a supplemental judgment awarding Sherwood Park Business Center, LLC (SPBC) attorney fees and costs against Taggart and costs against BT. They assert on appeal that Taggart's prior discharge in bankruptcy prevented the court from entering an award of fees or costs against him in this case and, furthermore, that no fees or costs should have been awarded to SPBC because SPBC did not file a statement for attorney fees as required by ORCP 68 C(4) and UTCR 5.080. SPBC, along with two of its members, Terry Emmert and Keith Jehnke

(collectively, "plaintiffs"), cross-appeal the supplemental judgment.[1]

The judgment resolving the claims underlying the trial court's attorney fee award was appealed separately. *Sherwood Park Business Center, LLC v. Taggart*, 261 Or.App. 609, 323 P.3d 551, *rev. den.*, 355 Or. 879, 333 P.3d 333 (2014). In that case, we affirmed the trial court's judgment, rejecting defendants' challenges to the trial court's resolution of the claims and counterclaims. Meanwhile, the court entered the supplemental judgment at issue in this case. We described the events that gave rise to this litigation in our earlier opinion. We repeat here those facts that are pertinent to our analysis.

I. BACKGROUND

"SPBC is a limited liability company that was formed in 1999 to develop a small office complex." *Id.* at 612, 323 P.3d 551. "After its formation in 1999, SPBC was initially managed by Taggart and had four original members—Taggart, Jehnke, John Hoffard, and Anthony Benthin. In 2003, Emmert purchased Benthin's interest and became a member of SPBC." *Id.* at 615, 323 P.3d 551 (footnote omitted).

> "Late in 2004, Taggart began having financial difficulties and companies in which he was an owner or manager began to have cash flow problems. For at least one of those companies—Builder's, Inc.—Taggart diverted funds intended for payroll tax withholding to his own use. In early 2005, that company was placed in

---

[1] Taggart and BT were originally named as defendants in this case. Although Emmert and Jehnke were not originally plaintiffs in the case, we refer to them as plaintiffs along with SPBC for the sake of convenience.

> bankruptcy and Taggart disappeared for a period of time. Also in 2005, Taggart was removed as SPBC's manager and replaced by Jehnke.
>
> "In addition to diverting funds from Builder's, Inc., in late 2004 or early 2005, Taggart diverted approximately $30,000 from SPBC for his own purposes. SPBC initiated an arbitration proceeding; Taggart was represented by attorney [John] Berman during that proceeding. Ultimately, the arbitrator concluded that Taggart had converted funds from SPBC and breached his fiduciary duty to that company. A judgment was entered in favor of SPBC and against Taggart in 2008. Eventually, Berman paid that judgment.
>
> "* * *
>
> "In mid–2007, Berman advised Taggart to form an LLC and transfer his interest in SPBC to that LLC. Berman told Taggart that he could then freely sell his interest in the newly formed LLC to a third party without complying with restrictions imposed by the SPBC operating agreement on transfers of membership interests in SPBC. Berman assisted Taggart in forming BT (the new LLC) in July 2007. Taggart held 100 percent of the membership interests in that LLC and transferred his entire interest in SPBC to the LLC as its sole asset."

Id. at 615–16, 323 P.3d 551.

After Taggart had signed a document to transfer his interest in SPBC to BT, Berman e-mailed SPBC's attorney and informed him of the transfer; however, no "documentation of the transfer was provided to SPBC at that time." *Id.* at 617, 323 P.3d 551. "In late 2007, Berman took a security interest in Taggart's interest in BT to

secure payment of his fees. Then, in December of that year, Berman agreed to purchase an interest in BT[.]" *Id.* Over several months, Berman paid a total of $200,000 and ultimately received Taggart's entire interest in BT. "Berman and Taggart kept Berman's purchase of Taggart's interest in BT a secret until August 2008 and did not provide documentation of the transfer until the trial court ordered them to do so in the course of this litigation." *Id.*

Late in 2008, SPBC commenced this litigation. In its operative complaint, among other things, it sought to have the trial court expel Taggart from SPBC, declare that Taggart's attempted transfer of his interest in SPBC to BT was invalid, declare that BT had no interest in SPBC, and unwind the transactions between Taggart and BT.[2] It also sought attorney fees under the SPBC Operating Agreement.[3] BT, for its part, brought counterclaims in which it, among other things, sought equitable relief and asserted that Emmert and Jehnke[4] owed it a fiduciary duty and had breached that obligation. BT also alleged that, although it was not a party to the SPBC Operating Agreement, and "[n]otwithstanding that SPBC cannot

---

[2] Berman was a defendant and counterclaim plaintiff in the underlying litigation; however, he is not a party on appeal.

[3] SPBC's first amended complaint alleges a claim for "Attorney fees—against all defendants." The text of the claim, however, asserts that, "if SPBC is a prevailing party, it is entitled to an award of attorney fees in its favor and against Taggart." The prayer for relief, likewise, seeks a judgment for "attorney fees incurred by SPBC against Taggart."

[4] As we noted in our original opinion, Emmert and Jehnke were originally brought into this case as third-party defendants and were later designated as counterclaim defendants. *See Sherwood Park Business Center, LLC*, 261 Or.App. at 611 n. 3, 323 P.3d 551.

assert attorney fees against [BT], since [SPBC] has asserted that the Operating Agreement's attorney fee clause applies, [BT is] entitled to recover [its] attorney fees unilaterally as the prevailing part[y]." Taggart, in a separate pleading, likewise asserted that he was "entitled to recover his attorney fees herein pursuant to Section 13.6 of [SPBC's] Operating Agreement and pursuant to ORS 20.105." Emmert and Jehnke, having been brought into the case by BT, brought their own claims. Among other things, they brought claims for declaratory relief and "[c]onspiracy to interfere with prospective economic advantage and contract," and sought attorney fees against BT under the SPBC Operating Agreement. SPBC later filed a pleading in which it "incorporate[d] and join[ed] in counterclaim defendants Terry W. Emmert and Keith Jehnke's counterclaims."

Before trial began, Taggart obtained a discharge of his debts in bankruptcy. The bankruptcy discharge, dated February 23, 2010, was filed with the trial court in March 2010. As discussed in our earlier opinion, Taggart filed a motion to dismiss the claims against him on the basis of the discharge.

> "At the beginning of the trial, the court addressed that motion. The court noted that it was 'not going to enter any money judgments against * * * Taggart, but I think there's some other claims that involve him that don't involve money.' Taggart asserted, however, that an 'attempt to unwind anything * * * would include [his] obligation to pay money back and that's * * * a financial impact on him. I think the Bankruptcy Code says that pre-petition conduct cannot be relied upon to cause financial liability to [a discharged] person.' Plaintiffs stated that they did not seek any monetary relief

against Taggart, and that dismissal was not appropriate because 'there is a nonmonetary claim for expulsion' and 'Taggart needs to remain in the case for purposes of the expulsion claim.' The court agreed:

"'I will not grant the motion to dismiss Mr. Taggart. Although I have already said and the other side has agreed that it's not a money judgment against him, but I think there are some technical claims that make him still technically a proper person in the lawsuit.'"

Sherwood Park Business Center, LLC, 261 Or.App. at 617–18, 323 P.3d 551 (ellipses and second brackets in original).

The case was then tried to the court. At the end of trial, the court announced its factual findings and legal conclusions. In particular, the court held that Taggart was subject to expulsion under ORS 63.209 and that it was appropriate to terminate Taggart's membership in SPBC. Furthermore, "the court determined that Taggart had not successfully transferred his SPBC membership interest to BT before that interest terminated[.]" *Id.* at 619, 323 P.3d 551. With respect to BT's claim for breach of fiduciary duty against Emmert and Jehnke, the court "concluded that there was no breach of fiduciary duty for two independent reasons: (1) as a matter of law, neither Emmert nor Jehnke owed fiduciary obligations to BT, and (2) even if they did owe a fiduciary duty, they did not breach it." *Id.* at 620, 323 P.3d 551.

After the trial, the parties did not agree as to the form of judgment that should be entered and, as a result, the court held a hearing at which the parties made arguments regarding the terms they believed that the judgment should contain. Taggart was present at that hearing but was not represented by an attorney. After hearing

argument from the attorneys, the court asked Taggart whether he "wish[ed] to argue anything at this juncture about what we're doing today?" Taggart replied:

> "MR. TAGGART: Only—the only thing I'd like to say, Your Honor, is that if—if the date is in 2008, then they do I feel they owe interest on that date. If it's not, then I—I deserved the—the tax benefit from that period of time. They can't have their cake and eat it too, in my opinion, so—
>
> "THE COURT: Very well.
>
> "MR. TAGGART: Fair is fair. Regarding the bankruptcy, my bankruptcy was discharged before you made your decision. There have been considerable payments made on the taxes already. We don't know what's the totals of those right now. My feeling is that any money that comes out of this should go into either an escrow account or Mr. Berman's trust account until we determine exactly what that number is. They're hopefully not going to be receiving a hundred percent of the proceeds * * *."

Taggart did not make any other argument during the hearing.

Ultimately, the court entered a general judgment as follows:

> "1. [SPBC] is entitled to judgment in its favor and against defendants Brad Taggart and BT of Sherwood, LLC * * * as follows:
>
> "(1) Brad Taggart's attempted transfer of his membership interest in [SPBC] to BT of Sherwood, LLC violated the Operating Agreement and Oregon law. The transfer is hereby deemed null and void;

"(2) Brad Taggart engaged in wrongful conduct as a member of [SPBC]. Brad Taggart is hereby expelled from [SPBC] effective January 1, 2008.

"(3) * * * Emmert and Jehnke have timely elected to purchase Taggart's 25% membership interest. Pursuant to Section 12.5 of the Operating Agreement, Keith Jehnke and Terry W. Emmert are entitled to purchase Brad Taggart's 25% membership interest in [SPBC] as follows:

> "The purchase price shall be the fair market value of the Company as of the date of entry of Judgment multiplied by Taggart's 25% membership interest, less any unpaid post-bankruptcy petition attorney fees, costs and prevailing party fees which might be assessed against Taggart pursuant to ORCP 68 and ORS Chapter 20 and necessary proceedings in bankruptcy court or this court.
>
> "* * * * * *

"2. * * * Emmert and Jehnke are entitled to judgment in their favor on their First Counterclaim (joined by [SPBC]) and it is hereby adjudged that: [BT was] not [a member] or authorized assignee[ ] of an existing member of [SPBC] in 2008, 2009, or the present. Accordingly, [it was] not and [is] not entitled to receive any distributions or allocations of profits or losses of [SPBC] since 2008.

"3. No parties are awarded money damages. All other claims, cross-claims, counterclaims, third-party claims, and counterclaims to third-party claims are dismissed with prejudice. Any party seeking fees or costs shall do so in accordance with ORCP 68."

Following entry of the general judgment, in June 2011, Emmert and Jehnke's attorney, Brown, filed a motion seeking attorney fees and costs from defendants in favor of plaintiffs.[5] At the same time, Brown and SPBC's attorney, Edelson, filed declarations in support of the petition for attorney fees and costs. BT objected to the petition. BT contended that no fees could be awarded against it because, it asserted, "SPBC has not filed either a petition for attorney fees or a cost bill," and Emmert and Jehnke's attorney could not file a "claim for attorney fees or costs on behalf of SPBC." In addition, BT asserted that SPBC had not alleged any right to fees against BT. BT further asserted that the other parties were seeking attorney fees pursuant to the SPBC Operating Agreement and statutory provisions relating to the imposition of contractual attorney fees, but, because BT was not a party to the Operating Agreement it could not be held liable for fees under that agreement. As to costs, BT asserted that Emmert and Jehnke were not prevailing parties as to BT and, therefore, were not entitled to recover costs against it.

Taggart similarly objected to any imposition of attorney fees or costs against him, pointing out that he had obtained a bankruptcy discharge before the trial in this case and asserting that "it would be a violation of [his] bankruptcy discharge to claim attorney fees or costs against [him] with regard to this matter."

In response to BT's objections, Edelson filed a supplemental declaration stating that Brown had filed the

---

[5] Plaintiffs sought attorney fees pursuant to both ORS 20.105 and the SPBC Operating Agreement. The court rejected the request for fees pursuant to ORS 20.105, and that ruling is not challenged on appeal.

joint petition for attorney fees and costs "[u]pon [Edelson's] request and with [his] permission." Furthermore, he pointed out that SPBC had filed a pleading in which it adopted Emmert and Jehnke's counterclaims, which included a claim for attorney fees against BT. In addition, in a reply memorandum, plaintiffs asserted that, because Taggart (1) failed to dismiss his counterclaim for attorney fees, (2) filed a motion for protective order and motion to dismiss subsequent to the discharge, and (3) personally appeared and argued at the hearing regarding the form of judgment, he was "liable for attorney fees incurred post-discharge." As to BT, plaintiffs asserted that BT was liable pursuant to the SPBC Operating Agreement because "BT claimed to be the authorized assignee of Mr. Taggart's full membership interest and claimed benefits available under the Operating Agreement only to members of SPBC. BT's claims were based upon the Operating Agreement, and the Operating Agreement itself provides for attorney fees for the prevailing party in an action to enforce or interpret a provision of the agreement.

The trial court held a hearing on the issue of attorney fees on August 1, 2011, and later issued a letter opinion resolving the issues presented by the parties' arguments. It concluded that the costs and the "hourly rate and time expended by counsels for the moving parties are reasonable."

With respect to the request for fees as to Taggart, the court observed that, pursuant to *In re Ybarra*, 424 F.3d 1018 (9th Cir.2005), it had "power to award post-petition attorney fees against a debtor who continues to pursue litigation post-petition that had been begun pre-petition." With that standard in mind, the court concluded that it was

appropriate to award attorney fees and costs against Taggart regardless of the bankruptcy discharge:

> "Taggart filed an answer that was file stamped October 28, 2009. The answer contained a counterclaim for attorney fees based on Section 13.6 of the Operating Agreement.
>
> "The answer sought to have plaintiff's claim to be dismissed against him. This was consistent with the oral Motion to Dismiss raised at the time of trial. Taggart never abandoned his counterclaim for attorney fees. Rather he continued to pursue his position post-petition that the plaintiff's claim against him be dismissed which, if successful, would have led to Taggart having a contractual right to obtain attorney fees."

In contrast, the court declined to award attorney fees against BT. The court observed that counsel for SPBC had "directed the court to ORS 20.083 with the lawyerly comment that his 'enthusiasm for its applicability has diminished.'" Ultimately, the court concluded that BT "was not a party to the contract. Taggart never successfully assigned his interest to" it. Thus, BT "cannot be liable for attorney fees based on the contract."

On the issue of costs, the trial court determined that SPBC was the prevailing party with respect to both Taggart and BT and was entitled to costs. However, the court did not award costs to Emmert and Jehnke, concluding that neither Emmert and Jehnke nor BT were "prevailing parties with respect to each other." The court also "relie[d] expressly on ORCP 68 B which grants the court discretion ('unless the court otherwise directs') vis a vis costs and disbursements."

Based on those rulings, the trial court entered a supplemental judgment awarding SPBC $45,404.30 in attorney fees and costs from Taggart and $3,309.95 in costs from BT. The judgment provided that Emmert and Jehnke were "not entitled to any award of fees or [c]osts from" Taggart or BT.

II. ANALYSIS

As noted, defendants appeal the supplemental judgment, asserting that the trial court erred in entering a judgment for attorney fees and costs. Plaintiffs, for their part, raise two assignments of error on cross-appeal with respect to the supplemental judgment. We begin by addressing defendants' contentions on appeal and then turn to the issues raised on cross-appeal.

A. *Appeal—Fees and costs against Taggart*

Defendants first assign error to the trial court's award of attorney fees and costs against Taggart. They assert that Taggart's discharge in bankruptcy prevented an award of attorney fees or costs from being entered against him.

As the court explained in *Ybarra*, a bankruptcy discharge "releases the debtor from personal liability for [his or] her pre-bankruptcy debts." 424 F.3d at 1022. A discharge "is the legal embodiment of the idea of the fresh start; it is the barrier that keeps the creditors of old from reaching wages and other income of the new." *Id.* (internal quotation marks omitted). However, where there is "post-petition voluntary action on the part of the debtor" that gives rise to a claim for attorney fees against him, the discharge may not prevent "the award of post-petition attorney fees." *Id.* at 1024. According to the court, "[e]ven if a cause of action arose pre-petition, the discharge shield

cannot be used as a sword that enables a debtor to undertake risk-free [post-petition] litigation at others' expense." *Id.* at 1026. Thus, "post-petition attorney fee awards are not discharged where post-petition, the debtor voluntarily 'pursue[d] a whole new course of litigation,' commenced litigation, or 'return[ed] to the fray' voluntarily." *Id.* at 1024 (quoting *Siegel v. Federal Home Loan Mortgage Corp.*, 143 F.3d 525, 533–34 (9th Cir.1998)) (brackets in *Ybarra*). "Whether attorney fees and costs incurred through the continued prosecution of litigation initiated pre-petition may be discharged depends on whether the debtor has taken affirmative post-petition action to litigate a prepetition claim and thereby has risked the liability of these litigation expenses." *Id.* at 1026; *see In re Gillespie*, 516 B.R. 586, 592 (9th Cir. BAP 2014) (applying rule from *Ybarra* to conclude that the debtor was "not entitled to a discharge of * * * postpetition attorney fees" where the debtor "chose to resume his participation in the state court action postpetition in order to preserve his * * * asserted interest in the collateral, in his cross-claims, and in his defenses to [the other party's] claims").

Here, defendants assert, Taggart did not engage in any conduct post-discharge that constitutes a return to the fray and, therefore, the bankruptcy discharge bars entry of an award of attorney fees in this case.

We note that, while this appeal was pending, the United States District Court for the District of Oregon was presented with and decided this issue as to these parties. Taggart had sought to have Emmert, Jehnke, their attorney, and SPBC held in contempt for violating the bankruptcy discharge injunction by seeking attorney fees in this case. *Taggart v. Brown*, No 3:12–CV–00236–MO,

2012 WL 3241758 (D.Or., Aug 6, 2012), *appeal dismissed*, 575 Fed.Appx. 719 (9th Cir.2014). After the bankruptcy court denied the motion for contempt, Taggart appealed to the district court. The court considered whether Taggart, in this case, had engaged in post-petition conduct that constituted a return to the fray. As the court noted,

> "Taggart did not commence the litigation at issue here, nor can the state court case be considered the commencement of a new suit. He did bring a counterclaim for attorney fees prepetition, which was eventually discharged back to him upon resolution of his Chapter 7 case, and which he never affirmatively moved to dismiss post-petition. [His] remaining involvement in the lawsuit post-discharge is described as follows. Prior to trial, Mr. Berman filed a motion for a protective order on behalf of Mr. Taggart in which he requested that a subpoena for Mr. Taggart's second deposition be quashed, as well as attorney fees in connection with the motion. Mr. Berman also filed a pretrial motion to dismiss in which he sought to dismiss the claims against Mr. Taggart pursuant to his Chapter 7 discharge. Mr. Berman renewed the motion orally at the close of evidence. After the trial, and after [a form of judgment including attorney fees had been submitted], Mr. Berman filed an objection on behalf of himself and BT, in which he also argued that no attorney fees or costs, pre or post-bankruptcy, could be assessed against Mr. Taggart pursuant to *In re Ybarra*.
>
> * * * At the hearing with regard to Mr. Berman's objection, Mr. Taggart, who the state court had previously ruled maintained a 25% interest in [SPBC], appeared on his own behalf and argued in

> entirety that plaintiffs should have to pay interest on the purchase price of his interest in SPBC for the three years that had passed and that any proceeds from the subsequent transaction should go into an escrow account. Following the [general judgment], Mr. Taggart personally filed 'Objections to Attorney Fees and Costs,' and a Notice of Appeal. In the former, he argued that any claim for fees or costs violated his Chapter 7 discharge."

Id. at *4 (internal citations omitted).

The district court then considered whether Taggart's actions were "sufficiently affirmative and voluntary to constitute returning to the fray." *Id.* It concluded that they were not. According to the district court, Taggart's objection to the second deposition was simply a reaction "to what he viewed as an oppressive litigation strategy as opposed to affirmatively committing an act that forced [the other parties] to incur post-petition legal fees." *Id.* Likewise, Taggart's assertions to the trial court that he could not be held liable for attorney fees "were reactionary and solely in response to a potential judgment against him for attorney fees, as opposed to affirmative and voluntary actions for the purpose of seeking attorney fees for himself." *Id.* The district court also concluded that Taggart's remaining actions did not constitute voluntary, affirmative post-petition conduct that would subject him to liability for attorney fees. The court explained that Taggart merely sought to extricate himself from the case by way of the motion to dismiss in light of the bankruptcy discharge and "did not move to dismiss the claims against him on the merits." *Id.* at *5. Similarly,

> "the fact that Mr. Taggart failed to affirmatively dismiss his counterclaim does not change the

> conclusion either, because the [other parties] here never requested that Mr. Taggart dismiss his counterclaim after arguing that he should remain in the case, nor did Mr. Taggart's failure to seek dismissal of the counterclaim cause [the opposing parties] to take action themselves lest they face judgment. Lastly, Mr. Taggart's actions in requesting to be dismissed pursuant to his bankruptcy injunction, opposing the second deposition, and failing to dismiss his counterclaim should not have indicated to [SPBC, Emmert, and Jehnke] that he affirmatively intended to seek attorney fees."

Id. Accordingly, the court reversed and remanded the bankruptcy court's ruling that the parties seeking attorney fees from Taggart were not in contempt.

We agree that Taggart's post-petition conduct before the trial court in this case was not voluntary, affirmative post-petition action such that he should have been held liable for attorney fees. Post-petition, Taggart moved to dismiss the claims against him on the basis of the bankruptcy petition. He did not seek a ruling on the merits of the claims against him but, rather, sought to extricate himself from the litigation and thereby obtain the fresh start the bankruptcy was intended to afford him. Taggart did not participate in the trial of the case. Although he spoke briefly at the hearing on the form of the judgment after the court refused to dismiss him from the litigation, Taggart's comments—in response to a question from the court—were minimal. He merely stated that he believed interest should accrue beginning in 2008—the date that he was deemed expelled from SPBC—and that any funds should be put into an escrow account. In our view, those

actions were not the type of voluntary affirmative acts that would constitute a return to the fray of litigation. Likewise, Taggart's remaining actions, such as his objection to the imposition of fees or costs against him based on the bankruptcy discharge, were simply attempts to shield himself from the continued litigation and do not provide a basis for the imposition of attorney fees. Finally, Taggart's failure to dismiss his counterclaim for attorney fees does not amount to the "pursu[it of] a whole new course of litigation, commence[ment of] litigation, or return[ing] to the fray voluntarily." *Ybarra*, 424 F.3d at 1024 (internal quotation marks omitted). Rather than engaging in affirmative action to continue the litigation, Taggart passively failed to take action. In sum, we agree that Taggart did not engage in conduct that, under *Ybarra*, would result in liability for post-petition attorney fees before the trial court. Accordingly, we conclude that the court erred in awarding SPBC fees and costs against him.

B. *Appeal—Costs against BT*

Next, defendants assert that, in any event, no award of attorney fees or costs could be entered in favor of SPBC because it did not file a statement for attorney fees or costs under ORCP 68 C(4).[6] In particular, they assert that SPBC failed to properly file a statement for attorney fees and costs under ORCP 68 C(4) because the statement that was filed, although purportedly on behalf of SPBC as well as Emmert and Jehnke, "was only signed by the attorney for Emmert and Jehnke." We reject that contention.

---

[6] As we have already explained, the award of attorney fees and costs against Taggart was improper in light of the bankruptcy discharge. However, the court also imposed costs against BT.

Under ORCP 68 C(4)(a), a "party seeking attorney fees or costs and disbursements shall, not later than 14 days after entry of judgment":

> "C(4)(a)(i) File with the court a signed and detailed statement of the amount of attorney fees or costs and disbursements that explains the application of any factors that ORS 20.075 or any other statute or rule requires or permits the court to consider in awarding or denying attorney fees or costs and disbursements, together with proof of service, if any, in accordance with Rule 9 C; and
>
> "C(4)(a)(ii) Serve, in accordance with Rule 9 B, a copy of the statement on all parties who are not in default for failure to appear." *See also Jaffe v. The Principle Company*, 215 Or.App. 385, 391, 170 P.3d 4 (2007) ("ORCP 68 C(4) requires that a party seeking attorney fees and costs must file its statement within 14 days after the judgment has been entered.").

Here, the attorney fee petition was filed within 14 days of the trial court's entry of the general judgment. The petition was signed by Emmert and Jehnke's attorney, Brown, and explicitly sought attorney fees on behalf of SPBC as well as Emmert and Jehnke. It was accompanied by a declaration from SPBC's attorney, Edelson. In that declaration, which Edelson signed under penalty of perjury, he, among other things, detailed the fees and costs that he requested, discussed his education and experience, talked about the other attorneys who had worked on the case and their experience and hourly rates, and explained why the fees sought were reasonable under all the circumstances of this case. As noted, in a second declaration, Edelson stated that Emmert and Jehnke's attorney had filed the petition for fees and costs on behalf

of SPBC along with his own clients and had done so upon Edelson's request and with his permission. Suffice it to say that, in our view, the petition and accompanying declarations satisfied the requirement of ORCP 68 C(4) that a party seeking attorney fees or costs and disbursements file a signed detailed statement of the amount of attorney fees or costs within 14 days after entry of judgment.

Defendants raise additional complaints with respect to the schedule of fees and costs under UTCR 5.080 which we reject without discussion. In sum, we conclude that the trial court did not err in awarding costs in favor of SPBC and against BT.

C. *Cross-appeal—Denial of attorney fees against BT*

As noted, with respect to SPBC's entitlement to recover its attorney fees from BT, the trial court concluded that, because BT was not a party to the contract which contained the attorney fee provision, BT could not be liable for attorney fees. On cross-appeal, plaintiffs assert that the trial court erred "in ruling that there could not be an attorney fee award against BT." In plaintiffs' view, attorney fees could be awarded against BT under ORS 20.096 and ORS 20.083 even though BT was not a party to the Operating Agreement. Defendants respond that SPBC did not allege a right to attorney fees in its pleadings and that, in any event, because "there was no contract providing for an award of attorney fees to which BT was a party, no attorney fees were awardable * * * against BT."[7]

---

[7] Defendants also assert that SPBC cannot be awarded attorney fees because it failed to file a statement for attorney fees, a contention

We begin by noting that defendants are incorrect in their assertion that SPBC did not allege a right to fees against BT in its pleadings. Defendants observe that, in the text of its complaint, SPBC asked for attorney fees against Taggart only. However, defendants fail to note that, in response to defendants' answer and counterclaims, Emmert and Jehnke filed counterclaims, including a claim for attorney fees against BT and, in its pleading in response to defendants' counterclaims, SPBC "incorporate[d]" and "join[ed]" in Emmert and Jehnke's counterclaims. As plaintiffs point out, "[b]y incorporating and joining in the counterclaims filed by Emmert and Jehnke, SPBC * * * alleged a counterclaim for attorney fees against BT."

Nonetheless, defendants contend that the trial court correctly declined to hold BT liable for attorney fees under a contract to which it was undisputedly not a party. The SPBC Operating Agreement lists as parties the original members of SPBC (Taggart, Hoffard, Benthin, and Jehnke) and "any other persons who are hereafter admitted as Members pursuant to the terms of this Agreement." Neither plaintiffs nor defendants in this case asserted that BT was a party to that agreement.

Under the attorney-fee provision of the agreement,

> "[i]n the event of any suit or action or arbitration proceeding to enforce or interpret any provision of this Agreement (or which is based on this Agreement), the prevailing party shall be entitled to recover, in addition to other costs, reasonable attorney fees in connection

---

that we discussed and rejected in our analysis of defendants' contentions on appeal.

> with such suit, action, arbitration, and in any appeal therefrom. The determination of who is the prevailing party and the amount of reasonable attorney fees to be paid to the prevailing party shall be decided by the arbitrator (with respect to attorney fees incurred prior to and during the arbitration proceedings) and by the court or courts, including any appellate courts, in which the matter is tried, heard, or decided, including the court which hears any exceptions made to an arbitration award submitted to it for confirmation as a judgment (with respect to attorney fees incurred in such confirmation proceedings)."

Under ORS 20.083,

> "[a] prevailing party in a civil action relating to an express or implied contract is entitled to an award of attorney fees that is authorized by the terms of the contract or by statute, even though the party prevails by reason of a claim or defense asserting that the contract is in whole or part void, a claim or defense that the contract is unenforceable or *a claim or defense asserting that the prevailing party was not a party to the contract.*"

(Emphasis added.) Furthermore, pursuant to ORS 20.096(1),

> "[i]n any action or suit in which a claim is made based on a contract that specifically provides that attorney fees and costs incurred to enforce the provisions of the contract shall be awarded to one of the parties, the party that prevails on the

> claim shall be entitled to reasonable attorney fees in addition to costs and disbursements, without regard to whether the prevailing party is the party specified in the contract and *without regard to whether the prevailing party is a party to the contract.*"

(Emphasis added.) In plaintiffs' view, those provisions, taken together, demonstrate that BT can be charged with attorney fees in this case.

Defendants, for their part, contend that plaintiffs' understanding of the law is incorrect. In their view, "if a litigant is not a party to a contract that provides for attorney fees to the prevailing party, then attorney fees can never be awarded against that litigant. Being wrongfully sued for attorney fees does not make that litigant liable for attorney fees." We agree with defendants that, under the unusual circumstances presented in this case—where the prevailing plaintiff is a party to a contract but the losing defendant is not and never claimed to be—the agreement, ORS 20.083, and ORS 20.096 do not provide for attorney fees to be charged against the losing party. Neither of the statutes in question works to create liability for attorney fees under a contract against a party who was not alleged to be, and never claimed to be, a party to that contract. Thus, the trial court did not err.

"ORS 20.096 was enacted in 1971 to provide reciprocal rights to attorney fees for contracts containing one-sided attorney fee provisions." *King v. Neverstill Enterprises, LLC*, 240 Or.App. 727, 731, 248 P.3d 30 (2011). As we explained in *King*, early on we interpreted that statute to authorize an "award of attorney fees to a defendant who had prevailed in [an] action by establishing that he was not

a party to the contract that the plaintiff had sought to enforce against him." *Id.* at 732, 248 P.3d 30 (citing *Golden West Insulation v. Stardust Investment Corp.*, 47 Or.App. 493, 615 P.2d 1048 (1980)). We reasoned that an attorney fee award was appropriate because, had the plaintiff prevailed at trial, it would have been entitled to an award of fees against the defendant. *Golden West*, 47 Or.App. at 512, 615 P.2d 1048. Thus, early on the case law

> "essentially established a broad principle of reciprocity under ORS 20.096: *viz.*, if a plaintiff brings a claim against a defendant based on a contract that had an attorney-fee provision, and that provision would entitle the plaintiff to recover fees if the plaintiff prevailed, then the defendant against whom the claim was made is entitled to recover fees when the defendant prevails, without regard to the basis on which the defendant prevailed."

King, 240 Or.App. at 732, 248 P.3d 30. However, later cases undermined that broad reciprocity principle, holding that a defendant who prevailed in a contract action by asserting the contract was void or should be rescinded could not obtain fees under the contract. *Id.* at 732–33, 248 P.3d 30 (citing *Care Medical Equipment, Inc. v. Baldwin*, 331 Or. 413, 15 P.3d 561 (2000), and *Bodenhamer v. Patterson*, 278 Or. 367, 563 P.2d 1212 (1977)). "The legislature adopted ORS 20.083 in 2003 to overturn those cases and to reinstate the broad reciprocity principle for attorney-fee awards in contract actions involving contracts containing attorney-fee provisions." *Id.* at 733, 248 P.3d 30.

The text of ORS 20.083 "consists of two clauses—one operative and one explanatory." *A & E Security and*

Electronic Solutions v. Fortalesa, 253 Or.App. 448, 450, 290 P.3d 861 (2012) (citing *King*, 240 Or.App. at 734–35, 248 P.3d 30). The "operative clause conveys a broad entitlement to attorney fees under a contract when ORS 20.083 is applicable[.]" *Id.* (internal quotation marks omitted). The explanatory clause "identifies examples of circumstances in which it applies. That is, the operative clause applies 'even' in those circumstances, but not 'only in them[.]'" *Id.* at 451, 290 P.3d 861. The issue is whether, in enacting ORS 20.083, the legislature intended "the statute's operative clause to provide 'an award of attorney fees that is authorized by the terms of [a] contract,'" *id.* (brackets in *A & E Security and Electronic Solutions*), when the party from which fees are sought was a stranger to the contract. We conclude that it did not.

First, ORS 20.083 specifically refers to attorney fees "authorized by the terms of [a] contract." However, as noted, the parties to the contract are the original members of SPBC along with any other persons later admitted as members under the terms of the agreement. Nothing in the contract purports to authorize an award of fees in litigation against a losing defendant who did not claim to be, and who was not asserted to be, a party to that contract.[8]

Nonetheless, plaintiffs argue that BT's assertion, in its answer and counterclaims, that it was not a party to the contract but that it was entitled to attorney fees if it prevailed, itself gives rise to a liability for fees because the statutes provide for reciprocity. Plaintiffs are incorrect. A mere assertion of a reciprocal right to fees under ORS

---

[8] We also note that, not only was BT never asserted to be a party to the contract, but the trial court also ultimately agreed with plaintiffs that Taggart never effectively transferred an interest in SPBC to BT.

20.083 does not itself authorize fees that would not otherwise be allowable under the contract and the statutes. The statutes are intended to ensure that, where a claim is made under a contract that would allow the prevailing party to receive fees, a party defending against that claim may also receive fees, even if that party prevails by asserting a defense that the contract does not control. *See A & E Security and Electronic Solutions*, 253 Or.App. at 455, 290 P.3d 861 (ORS 20.083 authorizes an award of fees when a party to a contract action prevails by obtaining rescission of the contract); *King*, 240 Or.App. at 731–32, 248 P.3d 30 (under ORS 20.083, defendant, who prevailed in contract action by establishing that plaintiff was not a party who could enforce the contract, was entitled to an award of fees). It does *not*, however, independently give rise to an entitlement to attorney fees in circumstances like those here—where the parties have agreed from the beginning that the losing defendant was not a party to the agreement containing the attorney fee provision. In this case, the trial court did not err in declining to award attorney fees against BT.

D. *Cross-appeal—Designation of prevailing parties*

In their remaining assignment of error on cross-appeal, plaintiffs contend that the trial court erred when it ruled that Emmert and Jehnke were not prevailing parties as to BT. In particular, as set forth above, the court ruled that "neither Terry Emmert and Keith Jehnke nor BT of Sherwood are prevailing parties with respect to each other." According to plaintiffs, "[a]s a matter of law, that ruling is in error. BT asserted counterclaims against Emmert and Jehnke, all of those claims were decided against BT; Emmert and Jehnke asserted counterclaims against BT, and a portion of those claims were decided in

their favor." Specifically, BT brought claims against Emmert and Jehnke for breach of fiduciary duty and declaratory judgment; Emmert and Jehnke, for their part, sought declaratory relief and damages for conspiracy to interfere with a prospective economic advantage. As Emmert and Jehnke point out, the court granted them declaratory relief, and dismissed BT's claims (along with Emmert and Jehnke's other claims) with prejudice. Thus, according to plaintiffs, the trial court should have considered Emmert and Jehnke's request for costs and fees against BT.

Even assuming that plaintiffs are correct that the trial court erred in failing to designate Emmert and Jehnke as prevailing parties with respect to BT,[9] in light of our other conclusions—in particular, our conclusion that no attorney fees may be assessed against BT and the trial court's clear exercise of discretion to deny costs between Emmert and Jehnke and BT (discussed below)—plaintiffs do not

---

[9] We note that plaintiffs cite no authority in support of their contention that, in light of the claims raised between BT and Emmert and Jehnke, the court was required to designate Emmert and Jehnke as prevailing parties as a matter of law. *See* ORS 20.077(1) ("In any action or suit in which one or more claims are asserted for which an award of attorney fees is either authorized or required, the prevailing party on each claim shall be determined as provided in this section); ORS 20.190 (setting forth prevailing party fees); *Brennan v. La Tourelle Apartments*, 184 Or.App. 235, 243, 245, 245 n. 2. 56 P.3d 423 (2002) (conclud-ing that trial court was required to designate a prevailing party with respect to claims under ORS 90.255, but "express[ing] no opinion as to whether there is a need to designate a prevailing party regarding other kinds of claims"); *see also Beggs v. Hart*, 221 Or.App. 528, 537–38, 191 P.3d 747 (2008) (in a case under ORS 20.077, the court must determine the prevailing party for each claim).

identify any harm that they have suffered as a result of that error.

The only consequences that plaintiffs identify as flowing from the trial court's failure to designate them as prevailing parties with respect to BT are that the court also failed to award them costs or to consider their request for fees against BT. But, as we have explained, BT could not be charged with fees under the operating agreement and ORS 20.083 and ORS 20.096. Furthermore, with respect to costs, the trial court expressly exercised its discretion to deny costs, stating that it "relie[d] expressly on ORCP 68 B which grants the court discretion ('unless the court otherwise directs') vis a vis costs and disbursements."

ORCP 68 B provides:

> "In any action, costs and disbursements shall be allowed to the prevailing party unless these rules or any other rule or statute direct that in the particular case costs and disbursements shall not be allowed to the prevailing party or shall be allowed to some other party, *or unless the court otherwise directs.* If, under a special provision of these rules or another rule or statute, a party has a right to recover costs, such party shall also have a right to recover disbursements."

(Emphasis added.) "By giving a trial court authority to 'otherwise direct [ ],' ORCP 68 B empowers the court with discretion not to award costs and disbursements to a prevailing party. Thus, we review the trial court's decision to not award costs and disbursements for abuse of discretion." *AutoLend, IAP, Inc. v. Auto Depot, Inc.*, 170 Or.App. 135, 143, 11 P.3d 693 (2000), *rev. den.*, 332 Or. 240, 28 P.3d 1175 (2001) (brackets in *AutoLend, IAP, Inc.*). The

court did not abuse its discretion in declining to award costs in this case.[10]

Under those circumstances, the trial court's failure to designate Emmert and Jehnke as prevailing parties with respect to BT did not result in the denial of fees or costs to Emmert and Jehnke—they were not entitled to fees against BT in any event, and the trial court independently exercised its discretion to deny them costs. Thus, we conclude that this assignment of error does not provide a basis for remand. *See Barbara Parmenter Living Trust v. Lemon*, 345 Or. 334, 338–39, 194 P.3d 796 (2008) (declining to resolve whether trial court erred in designating a landlord as a prevailing party where "[t]he designation has not resulted in any harm to tenants").

On appeal, attorney fees and costs against Taggart reversed; otherwise affirmed. On cross-appeal, affirmed.

---

[10] We reject plaintiffs' contention that the trial court was required to provide a more detailed explanation of its exercise of discretion to deny costs. The trial court properly cited ORCP 68 B as the source of its discretionary authority, and nothing in the court's explanation suggests that its exercise of discretion was based on a misunderstanding of the applicable law.

No. 18-489

In the Supreme Court of the United States

BRADLEY WESTON TAGGART, PETITIONER

v.

SHELLEY A. LORENZEN, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

JOHN M. BERMAN
7175 SW Beveland St., Ste. 210
Tigard, OR 97223

DANIEL L. GEYSER
Counsel of Record
GEYSER P.C.
One Energy Square
4925 Greenville Ave., Ste. 200
Dallas, TX 75206
(214) 800-2660
daniel.geyser@geyserpc.com

QUESTION PRESENTED

Whether, under the Bankruptcy Code, a creditor's good-faith belief that the discharge injunction does not apply precludes a finding of civil contempt.

PARTIES TO THE PROCEEDING BELOW

Petitioner is Bradley Weston Taggart.

Respondents are Shelley A. Lorenzen, executor of the estate of Stuart Brown; Terry W. Emmert; Keith Jehnke; and Sherwood Park Business Center, LLC.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statutory provisions and rules involved 2
Introduction 3
Statement 4
A. Background 4
B. Facts and procedural history 5
Summary of argument 10
Argument 13
A creditor's good-faith belief does not preclude liability for discharge violations under the Bankruptcy Code 13
A. Good faith is irrelevant under this Court's longstanding rules for general civil contempt 13
B. Good faith is irrelevant under a proper application of the Bankruptcy Code 16
1. The Code's text and context confirm that subjective intent is irrelevant to remedying discharge violations 17
2. The Code's purpose would be profoundly impaired if good faith excuses discharge violations 22
3. The Code's history confirms that subjective intent is irrelevant to remedying discharge violations 24
Conclusion 26

TABLE OF AUTHORITIES

Cases:

Bessette v. *Avco Fin. Servs., Inc.*, 230 F.3d 439 (1st Cir. 2000) 4, 5, 19, 23
Butler, In re, No. 09-8101, 2011 WL 806078 (Bankr. C.D. Ill. Mar. 2, 2011) 16
Cherry, In re, 247 B.R. 176 (Bankr. E.D. Va. 2000) 15
Cochran, In re, No. 83-1393, 2000 WL 35799020 (Bankr. S.D. Iowa Aug. 8, 2000) 16
Dyer, In re, 322 F.3d 1178 (9th Cir. 2003) 15
Espinosa v. *United Student Aid Funds, Inc.*, 553 F.3d 1193 (9th Cir. 2008), aff'd, 559 U.S. 260 (2010) 5
Food Lion, Inc. v. *United Food & Commercial Workers Int'l Union, AFL-CIO-CLC*, 103 F.3d 1007 (D.C. Cir. 1997) 16
Grogan v. *Garner*, 498 U.S. 279 (1991) 4
Hardy, In re, 97 F.3d 1384 (11th Cir. 1996) 7
Harley-Davidson, Inc. v. *Morris*, 19 F.3d 142 (3d Cir. 1994) 16
Howard Johnson Co. v. *Khimani*, 892 F.2d 1512 (11th Cir. 1990) 20
Hyman, In re, 502 F.3d 61 (2d Cir. 2007) 22
IRS v. *Murphy*, 892 F.3d 29 (1st Cir. 2018) 25
Jerman v. *Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573 (2010) 14
Jove Eng'g, Inc. v. *IRS*, 92 F.3d 1539 (11th Cir. 1996) ..... *passim*
Local Loan Co. v. *Hunt*, 292 U.S. 234 (1934) 22
McComb v. *Jacksonville Paper Co.*, 336 U.S. 187 (1949) ..... *passim*
McLean, In re, 794 F.3d 1313 (11th Cir. 2015) 19
Mu'min, In re, 374 B.R. 149 (Bankr. E.D. Pa. 2007) 21
Pratt, In re, 462 F.3d 14 (1st Cir. 2006) 15
SEC v. *McNamee*, 481 F.3d 451 (7th Cir. 2007) 16
Terrebonne Fuel & Lube, Inc., In re, 108 F.3d 609 (5th Cir. 1997) 18, 19, 20

Page

Cases—continued:

Walls v. *Wells Fargo Bank, N.A.*, 276 F.3d 502 (9th Cir. 2002) 21
Ybarra, In re, 424 F.3d 1018 (9th Cir. 2005) 4
Zilog, Inc., In re, 450 F.3d 996 (9th Cir. 2006) 9, 10, 21

Statutes and rule:

Bankruptcy Code, 11 U.S.C. 101-1532 ..... *passim*
11 U.S.C. 105 ..... *passim*
11 U.S.C. 362(k) 12, 21, 25
11 U.S.C. 362(k)(2) 21, 25
11 U.S.C. 524 ..... *passim*
11 U.S.C. 524(a)(1) 23
11 U.S.C. 524(a)(2) ..... *passim*
11 U.S.C. 727(b) 4
28 U.S.C. 1254(1) 2
Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, §§ 305(1)(B), 441(1)(A), 119 Stat. 23, 79, 114 25
Fed. R. Bankr. P. 4007 ..... 2, 15, 22

Other Authorities:

2 *Collier Bankruptcy Manual* (3d rev. ed.) ¶ 524.02[2][c] 5
H.R. Rep. No. 595, 95th Cong., 1st Sess. (1977) 4
Bill Rochelle, *Violation of Discharge Is Now Difficult to Prove in the Ninth Circuit*, ABI (Apr. 25, 2018) <tinyurl.com/ca9discharge> 24
S. Rep. No. 989, 95th Cong., 2d Sess. (1978) 4

In the Supreme Court of the United States

No. 18-489

BRADLEY WESTON TAGGART, PETITIONER

v.

SHELLEY A. LORENZEN, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 888 F.3d 438. The opinion of the bankruptcy appellate panel (Pet. App. 21a-51a) is reported at 548 B.R. 275. The opinion of the bankruptcy court regarding contempt liability (Pet. App. 52a-64a) is reported at 522 B.R. 627. The opinion of the bankruptcy court regarding contempt damages (Pet. App. 65a-75a) is unreported but available at 2015 WL 1320163.

JURISDICTION

The judgment of the court of appeals was entered on April 23, 2018. A petition for rehearing was denied on September 7, 2018 (Pet. App. 16a-20a). The petition for a writ of certiorari was filed on October 15, 2018, and granted on

January 4, 2019. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS AND RULES INVOLVED

Section 524 of the Bankruptcy Code, 11 U.S.C. 524, provides in pertinent part:

> (a) A discharge in a case under this title—
>
> * * * * *
>
> (2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived * * *.
>
> * * * * *

Section 105 of the Bankruptcy Code, 11 U.S.C. 105, provides in pertinent part:

> (a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.
>
> * * * * *

Rule 4007 of the Federal Rules of Bankruptcy Procedure, Fed. R. Bankr. P. 4007, provides in pertinent part:

> (a) PERSONS ENTITLED TO FILE COMPLAINT. A debtor or any creditor may file a complaint to obtain a determination of the dischargeability of any debt.

(b) TIME FOR COMMENCING PROCEEDING OTHER THAN UNDER § 523(C) OF THE CODE. A complaint other than under § 523(c) may be filed at any time. A case may be reopened without payment of an additional filing fee for the purpose of filing a complaint to obtain a determination under this rule.

* * * * *

INTRODUCTION

This case presents a simple question of federal bankruptcy law that is essential to the Code's effective administration. According to the Ninth Circuit, a creditor's "good faith" is sufficient to excuse a discharge violation, "even if the creditor's belief is unreasonable." In so holding, the Ninth Circuit departed from the opposite rule applied in other jurisdictions across the country for decades. In those courts, unlike the Ninth Circuit, a creditor who violates the discharge is liable in contempt, and the creditor's "subjective beliefs or intent" are irrelevant to that analysis.

The Ninth Circuit's novel rule is wrong, and the significance of its error is profound. A holding that a "good faith belief, even if unreasonable, insulate[s]" creditors from contempt (Pet. App. 13a) eviscerates the Bankruptcy Code's key mechanism for enforcing the discharge injunction and securing a debtor's fresh start. It asks innocent debtors to absorb the costs of creditor mistakes, and it deprives debtors of the essential tool for ending discharge violations and recovering their losses. Those losses are especially intolerable for debtors who have just emerged from bankruptcy, and whose finances remain in a fragile state.

The Ninth Circuit's stark departure from traditional practice is incompatible with principles of general civil contempt, and it conflicts with the Code's text, context,

purpose, and history. The traditional rule has promoted the Code and advanced Congress's interests for decades; the Ninth Circuit's unusual approach threatens to destabilize the proper functioning of the bankruptcy system, and severely undermine the Code's paramount interest in securing the debtor's fresh start. The decision below should be reversed.

STATEMENT

A. Background

1. The "principal purpose" of the Bankruptcy Code is granting debtors a "fresh start"—"'a new opportunity in life and a clear field of future effort, unhampered by the pressure and discouragement of preexisting debt.'" *Grogan* v. *Garner*, 498 U.S. 279, 286 (1991). To achieve that objective, the Code "discharges" most pre-petition debts (*e.g.*, 11 U.S.C. 727(b)), and "enjoins" creditors from trying to collect discharged debts (*e.g.*, *Bessette* v. *Avco Fin. Servs., Inc.*, 230 F.3d 439, 444 (1st Cir. 2000)). The scope of the protection is broad and automatic: once granted, a discharge "operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor." 11 U.S.C. 524(a)(2).

Congress designed this injunction "to give complete effect to the discharge": it "eliminate[s] any doubt concerning the effect of the discharge as a total prohibition on debt collection efforts," and "insure[s] that once a debt is discharged, the debtor will not be pressured in any way to repay it." H.R. Rep. No. 595, 95th Cong., 1st Sess. 365-366 (1977); see also S. Rep. No. 989, 95th Cong., 2d Sess. 80 (1978). The discharge, in short, "is the 'legal embodiment * * * of the fresh start.'" *In re Ybarra*, 424 F.3d 1018, 1022 (9th Cir. 2005).

2. Congress enforced these rights with Title 11's statutory contempt powers. Under 11 U.S.C. 105(a), courts may issue "any" order "necessary or appropriate" to "carry out the provisions of this title," and may "tak[e] any action or mak[e] any determination necessary or appropriate" to "enforce or implement court orders or rules." 11 U.S.C. 105(a). When the discharge is violated, Section 105 authorizes the provision of "'full remedial relief.'" *Bessette*, 230 F.3d at 445; see also *Espinosa* v. *United Student Aid Funds, Inc.*, 553 F.3d 1193, 1205 n.7 (9th Cir. 2008) ("sanctions" are authorized to "make [the debtor] whole") (citing 2 *Collier Bankruptcy Manual* (3d rev. ed.) ¶ 524.02[2][c]), aff'd, 559 U.S. 260 (2010).

B. Facts And Procedural History

1. This case's procedural history is "complex" (Pet. App. 4a), but the few pertinent facts are straightforward. The case arises out of a business dispute over membership interests in a LLC. Respondents sued petitioner in state court for allegedly transferring petitioner's interest in the LLC without honoring the agreement's right of first refusal. On the eve of trial, petitioner filed for Chapter 7 bankruptcy. The trial was stayed, and petitioner ultimately received a discharge. *Id.* at 4a-5a.

Thereafter, petitioner, citing the discharge, sought to be dismissed from the state-court litigation. (The proceedings were otherwise going forward against petitioner's attorney, who had acquired the LLC interest.) The trial court refused, finding petitioner was a necessary party, but the parties agreed not to pursue a money judgment against him. Pet. App. 5a-6a. After respondents prevailed at trial, however, they sought attorney's fees from petitioner, alleging that his post-bankruptcy participation in the case (which respondents themselves had demanded) fell outside the discharge injunction. *Id.* at 6a-7a.

Petitioner moved to reopen his bankruptcy case, and sought to hold respondents in contempt for violating the discharge injunction. Pet. App. 7a. The issue was simultaneously litigated in state and federal court. After separate appeals in each system, both the state appellate court and the federal district court found that respondents had indeed violated the discharge injunction. *Id.* at 8a-9a.[1]

2. a. The bankruptcy court subsequently held respondents in contempt for their willful violation of the discharge injunction. Pet. App. 52a-64a.

The bankruptcy court noted that discharge violations are enforced "by a motion invoking the contempt remedies allowed for in § 105(a)." Pet. App. 55a n.5. As the court explained, a creditor's violation must be "'willful'" to qualify for sanctions, and willfulness is determined by a two-part test: "[the court] must find first, that the alleged contemnor knew that the discharge injunction applied, and second, that the alleged contemnor intended the actions that violated the discharge injunction." *Id.* at 58a.

In applying that test, the court specifically rejected respondents' assertion that a creditor's "good faith belief" forecloses liability. Pet. App. 58a-63a; see also *id.* at 59a-

---

[1] The state trial court initially found that respondents' request for post-petition attorney's fees fell outside the discharge; that ruling was reversed by the Oregon court of appeals. See *Sherwood Park Bus. Ctr., LLC* v. *Taggart*, 267 Or. App. 217, 230 (Or. Ct. App. 2014) (finding petitioner "sought to extricate himself from the litigation and thereby obtain the fresh start the bankruptcy was intended to afford him"; his "minimal" actions sought "to shield himself from the continued litigation"). The bankruptcy court also found (relying in part on the state trial court's decision) that respondents' conduct fell outside the discharge; that ruling was reversed by the federal district court. *Taggart* v. *Brown*, No. 3:12-cv-236-MO, 2012 WL 3241758, at *4-*5 (D. Or. Aug. 6, 2012) (finding petitioner sought "to extricate himself from the lawsuit altogether"; his "actions were reactionary" and "in response to a potential judgment against him for attorney fees").

60a (expressly grounding its holding in "the Eleventh Circuit's willfulness test" from *In re Hardy*, 97 F.3d 1384 (11th Cir. 1996)). As the court explained, "[w]hether the Respondents knew the discharge was 'invoked' is a simple fact-based inquiry." *Id.* at 59a. And that inquiry "does not allow for the subjective belief, good faith or otherwise," regarding whether the discharge applied. *Id.* at 59a-60a.

With respondents' good-faith defense out of the picture, the bankruptcy court easily found a "willful" violation: (i) "it is not disputed that Respondents had actual knowledge that [petitioner's] bankruptcy discharge had been entered" when they pursued post-petition fees (Pet. App. 61a-62a); and (ii) "[t]here is no dispute in the record that [respondents] intended" the actions that violated the discharge (*id.* at 63a). The court accordingly held respondents "in contempt" for "violating [the] discharge injunction." *Id.* at 64a.

b. The bankruptcy court next determined petitioner's actual damages from the discharge violation. Pet. App. 65a-75a. Based on testimony and evidence developed at a hearing, the court entered an award of $5,000 for petitioner's "substantial harm in terms of his emotional distress," and an award of $105,593.71 for the fees and costs petitioner incurred as a result of the discharge violation. *Id.* at 69a, 73a.

The court also entered a $2,000 punitive-damages award for respondents' failure to timely vacate the state-court judgment hitting petitioner with post-petition fees. Pet. App. 74a-75a. As the court explained, respondents failed to correct the problem on their own—even after their conduct was declared unlawful—and "it ultimately required an order of this court * * * to get the supplemental attorneys' fees judgment vacated." *Id.* at 75a. The

court found "mild[] coercive punitive damages" were "appropriate as a sanction to insure that [petitioner's] discharge order is observed in [the] future." *Id.* at 74a-75a.

3. The bankruptcy appellate panel (BAP) reversed. Pet. App. 21a-51a.

Like the bankruptcy court, the BAP found the key facts undisputed: respondents were aware of petitioner's discharge and intended their actions in state court (pursuing discharged attorney's fees against petitioner). Pet. App. 36a-37a, 49a. But the BAP found the bankruptcy court applied "an incorrect legal standard" in holding respondents in contempt. *Id.* at 24a-25a.

According to the BAP, although the bankruptcy court referenced the Ninth Circuit's "correct" standard for finding a "willful[]" violation, it erred in "instead us[ing] the [Eleventh Circuit's] test from *Hardy*." Pet. App. 36a; see also *id.* at 48a ("the bankruptcy court erred when it relied on the *Hardy* test rather than using the Ninth Circuit's test"). As the court explained, "the Ninth Circuit has crafted a strict standard" in this setting: it "requires evidence showing the alleged contemnor was aware of the discharge injunction *and* aware that it applied to his or her claim." *Id.* at 43a-44a. The latter showing, the court continued, requires "a fact-based inquiry which implicates a party's subjective belief, even an unreasonable one." *Id.* at 44a. Accordingly, as the BAP concluded, "in order to recover for a violation of the discharge injunction, the debtor must establish the actor's subjective state of mind." *Id.* at 47a n.13.

The BAP thus held the bankruptcy court erred in declaring that respondents' "subjective or good faith beliefs were irrelevant." Pet. App. 49a. It thus reversed the bankruptcy court and vacated the sanctions award. *Id.* at 51a.

5. a. The Ninth Circuit affirmed, holding that respondents could "[]not be held in contempt" because they believed in "good faith" that the discharge injunction was inapplicable. Pet. App. 1a-15a.[2]

The Ninth Circuit initially noted that bankruptcy courts "may enforce the discharge injunction by holding a party in contempt for knowingly violating the discharge." Pet. App. 10a; *id.* at 12a n.4 (recognizing Section 105(a) as the source of contempt authority). But it found the bankruptcy court applied "an incorrect rule of law" in holding respondents in contempt. *Id.* at 12a.

According to the Ninth Circuit, a creditor's "good faith belief" excuses a discharge violation, "even if the creditor's belief is unreasonable." Pet. App. 12a. The court acknowledged its holding "appears to be somewhat in tension" with other decisions. *Id.* at 13a & n.5.[3] But it found itself bound by circuit precedent, "where [the circuit] stated that even an unreasonable belief that the discharge injunction did not apply to a creditor's claims would preclude a finding of contempt." *Id.* at 12a (citing *In re Zilog, Inc.*, 450 F.3d 996, 1009 n.14 (9th Cir. 2006)). As the panel understood its past authority, the circuit's decisions did not merely ask whether a creditor *knew* of a discharge,

---

[2] The parties had filed a series of cross-appeals, with petitioner challenging the BAP's determination that good faith precludes a sanctions award, and respondents challenging the district court's determination that they had violated the discharge. Pet. App. 9a. As explained below, one respondent eventually conceded that the discharge injunction was violated (*id.* at 14a & n.6), and the Ninth Circuit "decline[d]" to reach the other respondents' cross-appeals due to its dispositive holding on the good-faith defense. *Id.* at 14a.

[3] In expressly acknowledging this "tension," the panel flagged language from an earlier circuit decision articulating the legal standard for violations of the automatic stay, which the panel admitted was a direct quote from the Eleventh Circuit's decision in *Hardy*. Pet. App. 13a.

but instead whether the creditor knew "the discharge injunction [was] 'applicable'" to their claims. *Id.* at 13a. As the court concluded, "*Zilog*'s statement of the law is clear, directly addresses the question at issue in here, and is binding on this court." *Ibid.* Thus, in the Ninth Circuit, "the creditor's good faith belief that the discharge injunction does not apply to the creditor's claim precludes a finding of contempt, even if the creditor's belief is unreasonable." *Id.* at 12a.

Because the court found it uncontested that "the [c]reditors possessed a good faith belief that the discharge injunction did not apply to their claims," it concluded "their good faith belief, even if unreasonable, insulated them from a finding of contempt." Pet. App. 13a. With that sole holding disposing of the appeal, the court declined to reach a cross-appeal by certain respondents (challenging whether the discharge injunction was indeed violated), and reversed the sanctions award. *Id.* at 14a-15a.[4]

b. Petitioner filed a petition for rehearing, arguing that the court's decision conflicted with the decisions of multiple circuits. The full court of appeals denied rehearing without a single judge requesting a vote. Pet. App. 16a-20a.

This Court subsequently granted certiorari.

SUMMARY OF ARGUMENT

According to the Ninth Circuit, a creditor's "good faith belief" precludes liability for discharge violations. Pet. App. 12a. That decision violates traditional rules of civil

---

[4] As noted above, one respondent (Lorenzen) ultimately conceded that, in light of intervening circuit precedent, the discharge injunction was in fact violated. Pet. App. 14a n.6. The finding of a discharge violation is now conclusive for that respondent, and the court's "good faith" holding is thus indisputably outcome-determinative. *Id.* at 14a-15a & n.6.

contempt, conflicts with the Bankruptcy Code, and threatens the effective administration of the bankruptcy system. Discharge violations impose significant costs on debtors, who did nothing wrong. There is no basis for asking an innocent victim to pay the costs of a creditor's mistake. The judgment below should be reversed.

A. First and foremost, the Ninth Circuit's decision is incompatible with this Court's general principles of civil contempt. In *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187 (1949), the Court squarely held that good faith is irrelevant when "effect[ing] compliance" with an injunction. It explained that contempt is designed to enforce a decree—the law's protections are not contingent on the violator's state of mind. If a party fails to seek guidance from the issuing court, it assumes the risk of any mistakes and is responsible to "pay the damages caused by their violations."

Courts nationwide have consistently applied *McComb*'s framework in a multitude of settings, and it applies comfortably in the bankruptcy context. The discharge injunction is activated by both statutory directive and judicial decree. It strictly prohibits the collection of discharged debts, and it applies irrespective of a creditor's state of mind. The bankruptcy rules provide a specific procedure for creditors to determine whether a debt falls within the discharge or not; anyone choosing to unilaterally collect without seeking the bankruptcy court's guidance assumes the "risk of crossing the forbidden line."

The Ninth Circuit's holding below—"good faith" precludes contempt—directly contradicts *McComb*'s holding that "[a]n act does not cease to be a violation * * * merely because it may have been done innocently." Under this Court's decisions, respondents are liable to "compensate for losses or damages sustained by reason of noncompliance," good faith or not.

B. Apart from violating this Court's civil-contempt jurisprudence, the Ninth Circuit's standard is also incompatible with the Code.

1. The Ninth Circuit's standard cannot be squared with the Code's text or context. Congress granted bankruptcy courts broad remedial authority in Section 105. That provision authorizes courts to enforce the Code's provisions, which includes reestablishing the discharge (after violations) and making the debtor whole. The discharge secures the fresh start, and the fresh start is not restored if the debtor is left short on funds after defending an illegitimate collection action. There is nothing in law or logic categorically precluding remedial contempt where a party indeed violated the debtor's rights but did so in good faith.

This practice is further reinforced by the Code's context. In a variety of surrounding provisions, Congress proved it knew how to impose good-faith requirements where it so wished. Yet there is no hint of a general good-faith defense for discharge violations. What there is instead is a cause of action for automatic-stay violations (11 U.S.C. 362(k)) that plainly does *not* insulate good-faith errors. Stay violations and discharge violations are cut from the same cloth, and Congress's express policy in Section 362(k) reaffirms the overwhelming majority approach to Section 105.

2. The Code's purpose is also directly frustrated by the Ninth Circuit's standard. Subjective-intent requirements are difficult to administer; they encourage pretextual excuses and protracted litigation, and they undercut the debtor's ability to protect its rights. Congress granted debtors a fresh start, and it did not indicate any desire to stick debtors with the cost of creditor error. Creditors are in a better position to pay for the harm they wrongfully inflict (even by accident); there is no reason to let a good-

faith creditor off the hook only to ask a *good-faith debtor* to suffer the consequences.

3. The Code's history also cuts against a good-faith exception. Under the rule applied for decades in the vast majority of jurisdictions, the creditor's state of mind was irrelevant for remedial contempt. That rule has served the interests of the Code and advanced its effective administration. Congress has revamped the Code multiple times, and yet it has not once cast doubt on this sound practice.

Section 105 protects the "fresh start" and deters misconduct. *McLean*, 794 F.3d at 1320; see *McComb*, 336 U.S. at 194. The Ninth Circuit erred in eroding this essential tool for enforcing the Code, and its decision should be reversed.

ARGUMENT

A CREDITOR'S GOOD-FAITH BELIEF DOES NOT PRECLUDE LIABILITY FOR DISCHARGE VIOLATIONS UNDER THE BANKRUPTCY CODE

A. Good Faith Is Irrelevant Under This Court's Longstanding Rules For General Civil Contempt

The Ninth Circuit's position flouts bedrock contempt principles. This Court established the controlling framework back in *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187 (1949), and lower courts have faithfully applied that framework ever since. Under that framework, good faith "does not relieve from civil contempt." *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949). The court is permitted to order "damages caused by the[] violations," and "[t]he measure of the court's power * * * is determined by the requirements of full remedial relief." *Id.* at 193. There is no reason to deviate from this traditional standard in the bankruptcy context alone.

1. The Ninth Circuit should have ignored the creditor's subjective intent because this Court has *already said to ignore subjective intent.* In *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187 (1949), this Court squarely held that state of mind is irrelevant in the civil-contempt setting. 336 U.S. at 191. It explained that decrees and laws are "fashioned" to grant benefits to a protected class, and those benefits are not contingent "on the [violator's] state of mind." *Ibid.* It is up to regulated parties to obey the legal command, and their conduct "does not cease to be a violation of a law and of a decree merely because it may have been done innocently." *Ibid.*[5]

The Court also addressed the fundamental fairness of this approach. Anyone uncertain of an injunction's scope is perfectly free to seek "clarification" from the issuing court. 336 U.S. at 192. When parties instead decide to "make their own determination of what the decree mean[s]," they "act[] at their peril": "[t]hey kn[o]w full well the risk of crossing the forbidden line," so "there can be no complaint that the burden of any uncertainty in the decree is on respondent's shoulders." *Id.* at 192-193. The Court accordingly found it appropriate for the contemnors to "compensate for losses or damages sustained by reason of [their] noncompliance." *Id.* at 191, 193.[6]

---

[5] The Court distinguished the framework for "civil contempt" from the rules for "criminal contempt." 336 U.S. at 191. In the civil-contempt setting, the issue is "the power of a court to grant the relief that is necessary to effect compliance with its decree," which includes compensatory damages. *Id.* at 193.

[6] Cf. *Jerman* v. *Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 581-583 (2010) ("We have long recognized the 'common maxim, familiar to all minds, that ignorance of the law will not excuse any person, either civilly or criminally.' * * * Our law is therefore no stranger to the possibility that an act may be 'intentional' for purposes of civil liability, even if the actor lacked actual knowledge that her conduct violated the law.").

2. These general principles apply on all fours in this context. Just as in *McComb*, the discharge is a product of a statutory command (11 U.S.C. 524(a)(2)) and a judicial order (J.A. 59-60). A creditor violating its terms is both flouting an injunction and violating the Code. Congress did not condition the discharge on the creditor's state of mind; the "fresh start" is the Code's overriding objective, and there is an "important federal interest" in securing the debtor's full discharge rights. *In re Pratt*, 462 F.3d 14, 17, 19 (1st Cir. 2006); see also *Grogan*, 498 U.S. at 286. The discharge applies whether a creditor *thinks* it applies or not. And the Code has readily available means for seeking preclearance from the bankruptcy court (see Fed. R. Bankr. P. 4007(a), (b)); any creditor who acts unilaterally assumes the risk of error and the possibility of paying "damages caused by the[] violations." *McComb*, 336 U.S. at 193; *Jove Eng'g, Inc.* v. *IRS*, 92 F.3d 1539, 1557 (11th Cir. 1996).

The Ninth Circuit's rationale conflicts with this controlling authority. A rule "insulat[ing]" good-faith creditors from contempt (Pet. App. 13a) eliminates the Code's "benefits" and wrongly shifts the costs of non-compliance to the very class the law is designed to protect. *McComb*, 336 U.S. at 191. It undermines the "decree" and excuses those who roll the dice—leaving innocent debtors to pay the costs of the creditor's non-compliance. The Ninth Circuit gave no excuse why it failed to apply this Court's precedent. Other courts have acknowledged *McComb*'s applicability to discharge violations (*e.g.*, *In re Cherry*, 247 B.R. 176, 187 (Bankr. E.D. Va. 2000)), and the Ninth Circuit itself earlier recognized it applied to automatic-stay violations (*In re Dyer*, 322 F.3d 1178, 1191 (9th Cir. 2003)). Had the panel simply grappled with *McComb*, it would

have reached the opposite result. The panel erred in refashioning, without one whit of explanation, the bedrock principles of general civil contempt.[7]

B. Good Faith Is Irrelevant Under A Proper Application Of The Bankruptcy Code

Even aside from general contempt principles, the Code provides ample authority to redress discharge violations and restore the status quo ante—which requires compensating debtors for the losses suffered via a creditor's error. The Ninth Circuit's good-faith requirement would cripple that authority. The panel did not explain how its views were consistent with the text, context, purpose, or history of the Code, and it did not articulate any basis for letting creditors off the hook simply because they insist their wrongheaded (even "*unreasonable*") mistakes were done with innocent intent. Pet. App. 13a.

The Code's fresh start means little if debtors are constantly asked to spend uncompensated funds resisting

---

[7] Other courts of appeals have applied *McComb* in an identical fashion in a variety of non-bankruptcy settings. *E.g.*, *SEC* v. *McNamee*, 481 F.3d 451, 455-456 (7th Cir. 2007) ("*scienter* is not required in civil-contempt proceedings"); *Food Lion, Inc.* v. *United Food & Commercial Workers Int'l Union, AFL-CIO-CLC*, 103 F.3d 1007, 1016 (D.C. Cir. 1997) ("[A] finding of bad faith on the part of the contemnor is *not* required. Indeed, the law is clear in this circuit that 'the [contemnor's] failure to comply with the court decree need not be intentional.'"); accord *Harley-Davidson, Inc.* v. *Morris*, 19 F.3d 142, 148-149 (3d Cir. 1994). These courts have faithfully followed *McComb* for decades without any hint of problems or unfairness. There is no reason to think *McComb*'s logic somehow loses its force in the bankruptcy context alone. See, *e.g.*, *In re Butler*, No. 09-8101, 2011 WL 806078, at *9 (Bankr. C.D. Ill. Mar. 2, 2011) ("If a creditor's conduct violates the [discharge] injunction, good faith is no defense. * * * This principle is consistent with civil contempt proceedings outside of bankruptcy.") (citing *McComb*, 336 U.S. at 191); *In re Cochran*, No. 83-1393, 2000 WL 35799020, at *4 (Bankr. S.D. Iowa Aug. 8, 2000) (same).

baseless attempts to collect discharged debts. For decades now, the overwhelming majority of courts nationwide have construed their authority under Section 105 to allow compensatory relief to reverse the effects of violations and bring debtors back to their original baseline before the violation occurred. See Pet. 11-21 (so establishing). This practice is consistent with the Code's overall context, which shows Congress crafted good-faith exceptions where it so wished—but not here. And it is again consistent with Congress's efforts to usher these matters before the supervision of the bankruptcy judge, as evidenced by the creation of a simple, accessible means for good-faith creditors to return to bankruptcy court and seek guidance on their rights—*before* imposing substantial costs on the vulnerable class (debtors) who can least afford them.

The Ninth Circuit brushed off the obvious harm and unfairness in asking *good-faith* debtors to pay for a good-faith creditor's mistake. Its novel rule encourages aggressive creditors to take advantage of debtors, and it promises the huge waste of time and resources as courts try to ferret out pretextual good-faith defenses. The Code, properly understood, authorizes civil remedial relief irrespective of the creditor's state of mind. The Ninth Circuit's categorical rule has no mooring in the Code's text, context, purpose, or history, and it should be rejected.

1. The Code's Text And Context Confirm That Subjective Intent Is Irrelevant To Remedying Discharge Violations

a. Section 105 textually authorizes courts to enforce specific orders under the Code, including the discharge injunction: "The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title," and may "tak[e] any action or

mak[e] any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process." 11 U.S.C. 105(a); see also *Bennett*, 298 F.3d at 1069 (so holding regarding Section 524).

This remedial authority is exceptionally broad. While it limits courts to enforcing or restoring provisions of the Code (or related "orders or rules"), it otherwise places no obvious textual limits on the type or character of relief. On the contrary, by "us[ing] the broad term 'any,'" Section 105 "encompasses all forms of orders including those that award monetary relief." *Jove*, 92 F.3d at 1554; see also, *e.g.*, *In re Terrebonne Fuel & Lube, Inc.*, 108 F.3d 609, 613 (5th Cir. 1997) (holding Section 105's "unambiguous" language authorizes "civil contempt order[s]" that "compensate[] a debtor" for discharge violations, as "both necessary and appropriate to carry out the provisions of the bankruptcy code"). As a result, "bankruptcy courts across the country have appropriately used their statutory contempt power to order monetary relief * * * when creditors have engaged in conduct that violates § 524." *Bessette*, 230 F.3d at 445.

And in exercising that remedial contempt authority, the courts of appeals (aside from the Ninth Circuit) have recognized that subjective intent was irrelevant. In *Hardy*, for example, the Eleventh Circuit held that Section 105 authorized such relief irrespective of a creditor's good faith: "'the focus of the court's inquiry in civil contempt proceedings is not on the subjective beliefs or intent of the alleged contemnors in complying with the order, but whether in fact their conduct complied with the order at issue.'" 97 F.3d at 1390. Although sanctions "under a court's *inherent* powers" may require "'bad faith'"

(*ibid.*) (emphasis added)),[8] the court explained that the threshold is lower for Section 105's "statutory contempt": the creditor need only (i) be "aware of the discharge injunction," and (ii) have "intended the actions" that violated it. *Ibid.* (adopting the analogous "two-pronged test" for "determin[ing] willfulness in violating [Section 362's] automatic stay").

This understanding of Section 105 is unassailably correct. The point of the contempt order is to enforce the discharge injunction. And the discharge is designed to eliminate all banned collection attempts, *including the costs of resisting those attempts*. When a creditor violates the injunction, a contempt award is both "necessary" and "appropriate" to restore the status quo ante, which effectuates Section 524(a)'s directives. *Bessette*, 230 F.3d at 444-445; accord *Dyer*, 322 F.3d at 1193; *Jove*, 92 F.3d at 1554. Otherwise debtors are left covering the costs of correcting the creditor's mistake, leaving them in a worse condition than their proper baseline under the Code. See, *e.g.*, *McComb*, 336 U.S. at 191.

The Ninth Circuit has no obvious basis for declaring good faith relevant (much less dispositive) to these objectives. The contempt question is binary: the discharge injunction was either violated or it was not. Every uncompensated violation chips away at the debtor's fresh start and undermines the Code, irrespective of the creditor's

---

[8] Section 105's statutory powers are independent of a court's inherent contempt authority. See, *e.g.*, *Jove Eng'g, Inc.* v. *IRS*, 92 F.3d 1539, 1554 (11th Cir. 1996); see also, *e.g.*, *In re Terrebonne Fuel & Lube, Inc.*, 108 F.3d 609, 612-613 (5th Cir. 1997). Again, under Section 105, "Congress has empowered bankruptcy courts broadly to 'issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of' the Bankruptcy Code," "including sanctions to enforce the discharge injunction." *In re McLean*, 794 F.3d 1313, 1320 (11th Cir. 2015).

intent. See *Fina*, 550 F. App'x at 156 (the debtor "had to defend the lawsuit himself," generating "a financial cost that interfered with his right to a fresh economic start"). Compensatory relief is thus necessary to "carry out the provisions of this title" by "enforc[ing]," "implement[ing]," and ultimately restoring (to its fullest practical extent) the discharge injunction (11 U.S.C. 105(a)). See, *e.g.*, *Terrebonne Fuel*, 108 F.3d at 613.

In short, Section 105 grants courts the power to enforce the discharge by providing make-whole relief—thereby restoring the original state of the debtor's fresh start. There is no textual hook limiting this restorative power because a violator happened to act in good faith.[9]

b. In multiple respects, this plain-text understanding of Section 105 is advanced by the Code's statutory context and surrounding provisions.

First, although Congress did not include a *general* good-faith defense in Section 524, it *did* include narrow good-faith exceptions for specified activity. See, *e.g.*, 11 U.S.C. 524(*l*) (authorizing certain "good faith" actions that would otherwise violate the Code, "[n]otwithstanding any other provision of this title"). This confirms that Congress was well aware how to craft good-faith discharge defenses

---

[9] Respondents earlier argued that some courts excuse good-faith "'[c]onduct that evinces substantial, but not complete, compliance with the court order.'" Br. in Opp. 14 (quoting *Howard Johnson Co. v. Khimani*, 892 F.2d 1512, 1516 (11th Cir. 1990)). But true or not, respondents' failure to comply here was *total*. They sought discharged fees in state court and forced petitioner to expend significant funds defending himself from conduct that violated the Code. The fact that they acted in conjunction with a (void) state-court order (see 11 U.S.C. 524(a)(1))—and without first seeking available review in the bankruptcy court—does not override the bedrock rule that subjective intent is irrelevant. Nor does it explain how the discharge is fully restored if the debtor is left short on funds after defending the illegitimate collection action.

when it so wished. The fact that it chose not to excuse general discharge violations—despite the prevalent judicial practice of imposing remedial orders to compensate debtors—speaks volumes.

Second, the Ninth Circuit's "good-faith" requirement is directly at odds with Congress's express right of action under Section 362(k) for stay violations. Although Section 362(k) generally authorizes "actual damages" and (potentially) "punitive damages," Congress limited recovery for certain violations to "actual damages": those "based on an action taken by an entity in the *good faith belief* that subsection (h) applies to the debtor." 11 U.S.C. 362(k)(2) (emphasis added). The fact that Congress created a good-faith exception under subsection (2) confirms that good faith does *not* excuse general stay violations under subsection (1). See, *e.g.*, *In re Mu'min*, 374 B.R. 149, 168-169 (Bankr. E.D. Pa. 2007).

Courts broadly recognize the parallel between stay and discharge violations, and generally apply the identical standards to each. See, *e.g.*, *Zilog*, 450 F.3d at 1008 n.12. Congress's decision *not* to recognize a general good-faith exception supports petitioner's view while undercutting the Ninth Circuit's position below.[10]

---

[10] Nor is it telling that Congress created a private right of action for stay but not discharge violations. There is effectively uniform consensus that Section 362(k) was not meant to displace the general practice of awarding compensatory relief under Section 105; the provision was instead designed to increase protections for individual consumers (as opposed to corporate debtors or trustees), and to respond to concerns raised by some courts that the automatic stay, unlike the discharge injunction, was invoked by statute rather than court order—and thus, to some, fell outside traditional contempt authority. That concern was not relevant to court-ordered discharge injunctions. See, *e.g.*, *Walls* v. *Wells Fargo Bank, N.A.*, 276 F.3d 502, 509 (9th Cir. 2002).

Third, Congress expressly authorized creditors to invoke the bankruptcy court's jurisdiction to confirm that a debt is (or is not) dischargeable. See Fed. R. Bankr. P. 4007(a), (b). This reflects a clear logical scheme: rather than providing a good-faith defense to creditors who guess wrong, Congress set up a procedure so creditors would not have to guess in the first place. A creditor who refuses to invoke these procedures takes an obvious risk that its actions might run afoul of the discharge. But absolutely nothing in the Code's text or history suggests Congress intended to excuse violations of those who subjectively believe, wrongly, that their conduct is excused.[11]

2. The Code's Purpose Would Be Profoundly Impaired If Good Faith Excuses Discharge Violations

The Ninth Circuit's standard poses a grave threat to the Code's fresh start and the effective administration of the bankruptcy system.

A "primary purpose[]" of bankruptcy is to "'relieve the honest debtor from the weight of oppressive indebtedness, and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes.'" *Local Loan Co.* v. *Hunt*, 292 U.S. 234, 244 (1934). The Code's discharge injunction is essential to securing that fresh start. It is the single tool that best protects debtors as they seek to rebuild from financial misfortune and avoid the financial stress that drove them into bankruptcy. *In re Hyman*, 502 F.3d 61, 66 (2d Cir. 2007).

---

[11] To be sure, petitioner does not suggest that a creditor faces sanctions for seeking relief from the bankruptcy court (contra Pet. App. 46a-47a); respondents' mistake was focusing on the wrong forum. State courts have no power to rewrite Section 524 or modify the Code's discharge injunction. Where, as here, they guess wrong, their orders are "void." 11 U.S.C. 524(a)(1). Nothing prevented respondents from lodging a proper request with the bankruptcy court.

Its protection is so fundamental that Congress declared acts that violate the discharge "void[]" (11 U.S.C. 524(a)(1))—not merely voidable—and courts recognize broad authority to redress violations with "'full remedial relief'" (*Bessette*, 230 F.3d at 445).

The Ninth Circuit's decision debilitates these core protections. Under its holding, the cost of a creditor's good-faith mistake comes out of the debtor's pocket. There is no basis for asking debtors to absorb the costs of a *creditor's* error. Debtors are a sensitive class. They often emerge from bankruptcy in a fragile economic state. The loss of even a few hundred dollars can mean the difference between buying food and clothes for their families or struggling to meet basic needs. The correct incentive holds creditors accountable for their own misconduct, rather than shift those costs to innocent debtors who did nothing wrong. *Jove*, 92 F.3d at 1555-1556 (even "'inadvertent'" violations "cause[] actual and necessary extra expense to [the debtor]," and the "burden" must not "be shifted to [the debtor] or [its] counsel").[12]

The Ninth Circuit's rule also "gives creditors license to disregard discharge injunctions" with "pretextual arguments," making contempt "difficult to prove in the Ninth Circuit." Bill Rochelle, *Violation of Discharge Is Now Difficult to Prove in the Ninth Circuit*, ABI (Apr.

---

[12] Moreover, creditors have little excuse for any mistake: they have the ability to seek declaratory relief *before* acting, thereby avoiding harm in the first place. *Fina*, 550 F. App'x at 156 ("As the bankruptcy judge noted in this case, he is routinely asked to consider such modifications to discharge injunctions, and he routinely grants them. The proper course for the appellants was to first seek leave of the bankruptcy court before pursuing judgment against the debtor."); see *McComb*, 336 U.S. at 192-193. If creditors decide to roll the dice, they alone should pay the costs of their miscalculations. *Jove*, 92 F.3d at 1557.

25, 2018) <tinyurl.com/ca9discharge>; see also *Murphy*, 892 F.3d at 42 (if "good faith" excuses a discharge violation, "it is hard to imagine a case where a taxpayer could ever collect against the government").

It is not difficult for sophisticated, aggressive, well-funded creditors to conjure up pretextual reasons for pushing the discharge's limits. But it *is* difficult to expose a pretext for what it truly is. An examination into a creditor's state of mind requires hearings and testimony, and it imposes substantial costs on both parties and courts. Few attorneys will take such cases on contingency, and debtors can scarcely afford to pay for counsel on the heels of a bankruptcy. The result leaves debtors defenseless against even "unreasonable" behavior: "there is little to deter stay violations without the threat of contempt, and debtors may not be able to afford counsel to enforce their protections if contempt sanctions are generally unavailable." Bill Rochelle, *Raising a Circuit Split, Ninth Circuit's Taggart Opinion Heads for a 'Cert' Petition*, ABI (Sept. 11, 2018) <tinyurl.com/taggartcircuitsplit> (Rochelle).

Under the standard applied outside the Ninth Circuit, Section 105 serves its intended function as an essential remedial device and necessary deterrent. The Ninth Circuit's contrary decision undermines those critical objectives, wasting time and resources in a system that requires efficiency.

3. The Code's History Confirms That Subjective Intent Is Irrelevant To Remedying Discharge Violations

The Ninth Circuit's decision is also in significant tension with the Code's history. And the historical argument is both simple and obvious. For decades now, it has been the consistent (if not uniform) practice in jurisdictions na-

tionwide to award compensatory relief for discharge violations irrespective of subjective intent. See Pet. 11-21. As the First Circuit summarized, under settled law, when courts "evaluat[e] violations of both automatic stays and discharge orders," "[a] good faith belief in a right to the property" is "not relevant to determining whether the creditor's violation was willful." *IRS* v. *Murphy*, 892 F.3d 29, 38-39 (1st Cir. 2018) (surveying nationwide practice).

Congress has kept a close eye on the Code and its practical operation, including enacting major revisions. Those modifications have included amendments touching closely to the very interests at stake in this case. See, *e.g.*, Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, §§ 305(1)(B), 441(1)(A), 119 Stat. 23, 79, 114 (enacting Section 362(k)(2)). It is inconceivable that Congress would have left this widespread rule unchallenged if it disagreed with the standards adopted by the vast majority of courts. But indeed, rather than impose an express "good faith" requirement, Congress enacted Section 362(k)(2), which (i) confirms that Section 362(k)(1) generally does *not* have a good-faith component, and (ii) still authorized *actual damages* even where the violation was innocent.

This historical trend is consistent with the textual clues, which, in turn, are consistent with the profound importance of the discharge to the Code's administration. Jurisdictions nationwide have enforced the discharge, awarding compensatory relief, for decades now; there has been absolutely no concrete evidence that the standard is unfair, unworkable, or difficult to administer. On the contrary, it has proven essential to protecting the debtor's fresh start and deterring abuse. The Ninth Circuit was wrong to needlessly upset this sound practice.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted.

JOHN M. BERMAN
7175 SW Beveland St., Ste. 210
Tigard, OR 97223

DANIEL L. GEYSER
Counsel of Record
GEYSER P.C.
One Energy Square
4925 Greenville Ave., Ste. 200
Dallas, TX 75206
(214) 800-2660
daniel.geyser@geyserpc.com

FEBRUARY 2019

No. 18-489

In the Supreme Court of the United States

BRADLEY WESTON TAGGART,

Petitioner,

v.

SHELLEY A. LORENZEN, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS

JANET M. SCHROER
Hart Wagner, LLP
1000 SW Broadway
Portland, OR 97205

JAMES RAY STREINZ
Streinz Law Office LLC
7830 SW 40th Ave.
Portland, OR 97219

Counsel for Lorenzen

HOLLIS K. MCMILAN
Hollis K. McMilan, P.C.
4504 SW Corbett Avenue
Portland, OR 97239

Counsel for Emmert, Jehnke, and SPBC

NICOLE A. SAHARSKY
Counsel of Record
ANDREW E. TAUBER
MICHAEL B. KIMBERLY
MATTHEW A. WARING
MINH NGUYEN-DANG
Mayer Brown LLP
1999 K Street NW
Washington, DC 20006
(202) 263-3000

AARON GAVANT
Mayer Brown LLP
71 S. Wacker Dr.
Chicago, IL 60606

Counsel for All Respondents

QUESTION PRESENTED

Whether, under the Bankruptcy Code, a creditor's good-faith belief that the discharge injunction does not apply precludes a finding of civil contempt.

CORPORATE DISCLOSURE STATEMENT

Sherwood Park Business Center, LLC has no parent corporation, and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

Page

Introduction 1
Statutory provisions involved 3
Statement 3
A. Statutory background 3
B. Factual background 5
C. State court proceedings 6
D. Federal contempt proceedings 8
Summary of argument 11
Argument 15
A bankruptcy court should not hold a creditor in contempt for violating a discharge order when the creditor has a reasonable, good-faith belief that the order does not prohibit his conduct 15
A. Under Section 105 and traditional principles of contempt, a reasonable, good-faith belief precludes contempt sanctions 16
1. Section 105 authorizes bankruptcy courts to impose contempt sanctions when "necessary or appropriate" to enforce court orders 16
2. It is neither "necessary" nor "appropriate" to hold a person in contempt for violating a court order when he has a reasonable, good-faith belief that his conduct is allowed 18
a. Contempt is a severe sanction, designed for deliberate disobedience of a court order 18

TABLE OF CONTENTS
(continued)

Page

b. A person should not be held in contempt for violating a court order if he has good reason to believe the order does not apply to his conduct.....20

c. Good faith and bad faith matter in contempt proceedings 23

3. Respondents' rule is fair and administrable 27

4. The court of appeals correctly found contempt sanctions inappropriate, and its language about "unreasonable" good-faith beliefs is dictum 31

B. The federal government's rule is substantially the same and leads to the same result here 34

1. The government advocates an objective reasonableness rule that permits consideration of good faith 34

2. Any differences between the government's rule and respondents' rule do not matter here 36

C. The Court should not adopt petitioner's proposed rule 38

1. Petitioner proposes a near-strict-liability rule 38

2. Petitioner's near-strict-liability rule is inconsistent with Section 105 and traditional equitable principles 39

3. Petitioner's justifications for his rule are mistaken.....41

TABLE OF CONTENTS
(continued)

Page

4. Petitioner's requirement that creditors seek advance determinations is misguided 44

D. This Court should affirm rather than remand 47

Conclusion 50

Appendix – Statutory provisions 1a

TABLE OF AUTHORITIES

Page(s)

Cases

Air & Liquid Sys. Corp. v. *Devries*, No. 17-1104, 2019 WL 1245520 (Mar. 19, 2019) 33, 49

In re American Hous. Found., 785 F.3d 143 (5th Cir. 2015) 30

In re Apex Oil Co., 406 F.3d 538 (8th Cir. 2005) 46

Armstrong v. *Executive Office of President*, 1 F.3d 1274 (D.C. Cir. 1993) 22

Atlantic Coast Line R.R. v. *Brotherhood of Locomotive Eng'rs*, 398 U.S. 281 (1970) 46

Axia NetMedia Corp. v. *Massachusetts Tech. Park Corp.*, 889 F.3d 1 (1st Cir. 2018) 22

Baker Botts L.L.P. v. *ASARCO LLC*, 135 S. Ct. 2158 (2015) 43, 45

Balla v. *Idaho State Bd. of Corr.*, 869 F.2d 461 (9th Cir. 1989) 21

California Artificial Stone Paving Co. v. *Molitor*, 113 U.S. 609 (1885) ..... *passim*

CFE Racing Prods., Inc. v. *BMF Wheels, Inc.*, 793 F.3d 571 (6th Cir. 2015) 34

In re Chaffin, 816 F.2d 1070 (5th Cir. 1987) 30

Chambers v. *NASCO, Inc.*, 501 U.S. 32 (1991) 4, 26, 36

Chao v. *Gotham Registry, Inc.*, 514 F.3d 280 (2d Cir. 2008) 22, 26

Eden v. *Robert A. Chapski, Ltd.*, 405 F.3d 582 (7th Cir. 2005) 45

First State Bank of Roscoe v. *Stabler*, 914 F.3d 1129 (8th Cir. 2019) 4, 17, 45

TABLE OF AUTHORITIES
(continued)

Page(s)

Cases (continued)

Fox v. *Capital Co.*, 96 F.2d 684 (3d Cir. 1938) 22

FTC v. *Lane Labs-USA, Inc.*, 624 F.3d 575 (3d Cir. 2010) 22

Gascho v. *Global Fitness Holdings, LLC*, 875 F.3d 795 (8th Cir. 2017) 20, 22

In re General Motors Corp., 61 F.3d 256 (4th Cir. 1995) 21

Georgia Power Co. v. *NLRB*, 484 F.3d 1288 (11th Cir. 2007) 22

Gompers v. *Buck's Stove & Range Co.*, 221 U.S. 418 (1911) 27, 43

Grace v. *Center for Auto Safety*, 72 F.3d 1236 (6th Cir. 1996) 21, 22

Grogan v. *Garner*, 498 U.S. 279 (1991) 43

In re Hardy, 97 F.3d 1384 (1996) 38

Harley-Davidson, Inc. v. *Morris*, 19 F.3d 142 (3rd Cir. 1994) 26

Hutto v. *Finney*, 437 U.S. 678 (1978) 26, 36, 40

Illinois Migrant Council v. *Pilliod*, 540 F.2d 1062 (7th Cir. 1976) 26

Imageware, Inc. v. *U.S. W. Comm'ns*, 219 F.3d 793 (8th Cir. 2000) 21

Inmates of Allegheny Cty. Jail v. *Wecht*, 754 F.2d 120 (3d Cir. 1985) 23

International Longshoremen's Ass'n, Local 1291 v. *Philadelphia Marine Trade Ass'n*, 389 U.S. 64 (1967) ..... *passim*

TABLE OF AUTHORITIES
(continued)

Page(s)

Cases (continued)

International Union, United Mine Workers of Am. v. *Bagwell*, 512 U.S. 821 (1994) 29
IRS v. *Murphy*, 892 F.3d 29 (1st Cir. 2018) 42
Johnson v. *Home State Bank*, 501 U.S. 78 (1991) 17, 18, 40
Jove Eng'g, Inc. v. *IRS*, 92 F.3d 1539 (11th Cir. 1996) 4, 35
Katchen v. *Landy*, 382 U.S. 323 (1966) 44
King v. *Allied Vision, Ltd.*, 65 F.3d 1051 (2d Cir. 1995) 22
Latino Officers Ass'n City of N.Y., Inc. v. *City of N.Y.*, 558 F.3d 159 (2d Cir. 2009) 35
Law v. *Siegel*, 571 U.S. 415 (2014) 17
Leman v. *Krentler-Arnold Hinge Last Co.*, 284 U.S. 448 (1932) 18
Lopez v. *Davis*, 531 U.S. 230 (2001) 17
Maggio v. *Zeitz*, 333 U.S. 56 (1948) ..... *passim*
Maness v. *Meyers*, 419 U.S. 449 (1975) .. 12, 24, 36, 40
Marrama v. *Citizens Bank of Mass.*, 549 U.S. 365 (2007) 17, 26
McComb v. *Jacksonville Paper Co.*, 336 U.S. 187 (1949) ..... *passim*
Merrimack River Sav. Bank v. *City of Clay Ctr.*, 219 U.S. 527 (1911) 25
Midland Funding, LLC v. *Johnson*, 137 S. Ct. 1407 (2017) 44

TABLE OF AUTHORITIES
(continued)

Page(s)

Cases (continued)

Mitchell v. *Helena Wholesale, Inc.*,
163 F. Supp. 101 (E.D. Ark. 1958)..... 19

In re Mroz, 65 F.3d 1567 (11th Cir. 1995)..... 31

Natural Gas Pipeline Co. of Am. v. *Energy Gathering, Inc.*, 86 F.3d 464
(5th Cir. 1996)..... 20

Newman v. *Graddick*,
740 F.2d 1513 (11th Cir. 1984)..... 27

Ohlander v. *Larson*,
114 F.3d 1531 (10th Cir. 1997)..... 20

Penfield Co. of Cal. v. *SEC*,
330 U.S. 585 (1948)..... 43

In re Pertuset,
492 B.R. 232 (Bankr. S.D. Ohio 2012)..... 30

Project B.A.S.I.C. v. *Kemp*,
947 F.2d 11 (1st Cir. 1991)..... 18, 20, 21, 41

Reliance Ins. Co. v. *Mast Constr. Co.*,
84 F.3d 372 (10th Cir. 1996)..... 22

In re Revere Copper & Brass, Inc.,
29 B.R. 584 (Bankr. S.D.N.Y. 1983)..... 4

Schmidt v. *Lessard*, 414 U.S. 473 (1974)..... 21, 22

SEC v. *Hyatt*, 621 F.3d 687 (7th Cir. 2010)..... 21

Seminole Tribe of Fla. v. *Florida*,
517 U.S. 44 (1996)..... 32

SerVaas Inc. v. *Mills*,
661 Fed. Appx. 7 (2d Cir. 2016)..... 19

Shillitani v. *United States*,
384 U.S. 364 (1966)..... 20, 43

TABLE OF AUTHORITIES
(continued)

Page(s)

Cases (continued)

Spallone v. *United States*,
493 U.S. 265 (1990) 19, 40

Spectra Sonics Aviation, Inc. v. *Ogden City*,
931 F.2d 63, 1991 WL 59369
(10th Cir. Apr. 19, 1991) (Tbl.) 27

In re Spencer, 868 F.3d 748 (8th Cir. 2017) 26

In re Taneja, 743 F.3d 423 (4th Cir. 2014) 30

Thigpen v. *Roberts*, 468 U.S. 27 (1984) 49

Tivo Inc. v. *Echostar Corp.*,
646 F.3d 869 (Fed. Cir. 2011) 22

United States v. *Saccoccia*,
433 F.3d 19 (1st Cir. 2005) 34

United Student Aid Funds, Inc. v. *Espinosa*,
559 U.S. 260 (2010) 28, 46

Vertex Distrib., Inc. v. *Falcon Foam Plastics, Inc.*, 689 F.2d 885 (9th Cir. 1982) 27

In re Watts, 190 U.S. 1 (1903) ..... *passim*

Whitehouse v. *LaRoche*,
277 F.3d 568 (1st Cir. 2002) 45

In re Ybarra, 424 F.3d 1018 (9th Cir. 2005) 8, 47

Young v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987) 19

In re ZiLOG, Inc.,
450 F.3d 996 (9th Cir. 2006) 11, 32, 33

TABLE OF AUTHORITIES
(continued)

Page(s)

Statutes

Bankruptcy Code:

Ch. 1, 11 U.S.C. 101 *et seq.*:

11 U.S.C. 101(12) 47

11 U.S.C. 105(a) ..... *passim*

Ch. 3, 11 U.S.C. 301 *et seq.*:

11 U.S.C. 362(a) 3

11 U.S.C. 362(c)(3) 30

11 U.S.C. 362(c)(4) 30

11 U.S.C. 362(k)(1) 5, 13, 39, 41

11 U.S.C. 362(k)(2) 30, 42

11 U.S.C. 362(n)(1) 30

Ch. 5, 11 U.S.C. 501 *et seq.*:

11 U.S.C. 521(i)(4) 30

11 U.S.C. 523(a) 3, 27

11 U.S.C. 523(a)(2) 46

11 U.S.C. 523(a)(4) 46

11 U.S.C. 523(a)(6) 46

11 U.S.C. 523(c)(1) 3, 27, 44

11 U.S.C. 523(d) 45

11 U.S.C. 524(a)(2) 3, 28, 34

11 U.S.C. 548(c) 30

11 U.S.C. 550(b) 30

Ch. 7, 11 U.S.C. 701 *et seq.*:

11 U.S.C. 707(b) 43

11 U.S.C. 727 3

TABLE OF AUTHORITIES
(continued)

Page(s)

Statutes (continued)

11 U.S.C. 727(b) 47

Ch. 9, 11 U.S.C. 901 *et seq.*:

11 U.S.C. 944 3

Ch. 11, 11 U.S.C. 1101 *et seq.*:

11 U.S.C. 1129(a)(3) 30

11 U.S.C. 1141 3

Ch. 12, 11 U.S.C. 1201 *et seq.*:

11 U.S.C. 1225(a)(3) 30

11 U.S.C. 1228 3

Ch. 13, 11 U.S.C. 1301 *et seq.*:

11 U.S.C. 1325(a)(3) 30

11 U.S.C. 1328 3

11 U.S.C. 1328(a) 3, 27

18 U.S.C. 401 19

Internal Revenue Code:

26 U.S.C. 7433(d)(3) 5

26 U.S.C. 7433(e) 40

26 U.S.C. 7433(e)(1) 5

26 U.S.C. 7433(e)(2) 5

28 U.S.C. 1334(a) 45

28 U.S.C. 1334(b) 4, 45

28 U.S.C. 1334(c)(1) 46

28 U.S.C. 1334(c)(2) 46

Judiciary Act of 1789, 1 Stat. 83 19

Cal. Bus. & Prof. Code § 6086.7(a) 19

TABLE OF AUTHORITIES
(continued)

Page(s)

Rules

Fed. R. Bankr. P. 4007 4

Fed. R. Bankr. P. 4007 advisory committee's note (1987) 4

Fed. R. Bankr. P. 9011 31

Fed. R. Bankr. P. 9020 4

Fed. R. Civ. P. 8(c)(1) advisory committee's note (2010) 46

Fed. R. Civ. P. 11 31

Fed. R. Civ. P. 65(d) 27

Or. R. Civ. P. 68(C)(4)(a) 7, 29

D.D.C. Local Civ. R. 83.15(b) 19

Other Authorities

Barbara D. Gilmore, *Contempt and Sanction Powers of the Bankruptcy Court*, 18 J. Bankr. L. & Prac. 6 Art. 1 (2009) 17

Black's Law Dictionary (10th ed. 2014) 18, 42

22B Charles A. Wright et al., *Federal Practice & Procedure* (2d ed. 2018) 38

Edward M. Dangel, *Contempt* (1939) 18

Miriam-Webster's Collegiate Dictionary (10th ed. 1996) 18

Oxford English Dictionary (2d ed. 1989) 23

S. Rep. No. 55, 98th Cong., 1st Sess. (1983) 46

U.S. Courts, *Official Form 318*, perma.cc/2LPL-F2DG 3, 28

INTRODUCTION

Contempt of court is "a potent weapon," designed for the situation in which a litigant deliberately disobeys a clear court order. *International Longshoremen's Ass'n, Local 1291* v. *Philadelphia Marine Trade Ass'n*, 389 U.S. 64, 76 (1967). That is not this case.

Petitioner and respondents were involved in a contract dispute in state court when petitioner filed for bankruptcy. After the bankruptcy court granted petitioner a discharge, the state case resumed, and respondents prevailed. Under the parties' contract, respondents were entitled to attorneys' fees. But it was unclear whether they could obtain those fees in light of the discharge order, even if they limited their request to post-bankruptcy fees. So they asked the state court to resolve that question.

Everyone agreed that the state court had jurisdiction to decide whether the discharge order allowed an attorneys' fees award. The state court decided the issue in respondents' favor. Petitioner then asked the bankruptcy court to hold respondents in contempt, on the theory that they violated the discharge order by seeking attorneys' fees. Respondents argued that they had not violated the discharge order, and even if they had, they justifiably relied on the state court's decision. The court of appeals ultimately agreed and concluded that respondents could not be held in contempt. That conclusion was correct.

Bankruptcy courts may impose contempt sanctions when "necessary or appropriate" to enforce their own orders. 11 U.S.C. 105(a). Under longstanding equitable principles, it is neither necessary nor appropriate to hold a person in contempt for violating a court order when he has a reasonable, good-faith belief the order does not apply to his conduct. Here,

there was an open legal issue about the scope of the discharge order, and the state court resolved that issue in respondents' favor. Contempt was not appropriate.

Petitioner takes a very different view. He proposes a near-strict-liability rule that would require contempt sanctions for nearly all creditors who violate discharge orders, with no defense for creditors acting reasonably and in good faith. That rule cannot be squared with traditional notions of contempt, basic notions of fairness, or the bankruptcy court's broad statutory discretion.

Petitioner attempts to justify his rule as necessary to help debtors obtain a fresh start, but he takes that concept too far. The Bankruptcy Code seeks to balance the interests of debtors and creditors. Petitioner's rule would upset that balance by chilling creditors from collecting on non-discharged debts. And petitioner's rule would not actually help debtors. Debtors would still have to bear their own costs if creditors followed petitioner's suggested procedure and sought advance dischargeability determinations in bankruptcy court. So, if respondents had followed petitioner's procedure, petitioner would be no better off.

This Court should reject petitioner's rule and hold that contempt sanctions are not appropriate when a creditor had a reasonable, good-faith belief that the discharge order did not apply to his conduct. To the extent the court of appeals suggested that an "unreasonable" good-faith belief would be enough to avoid contempt sanctions, that language was dictum. The Court should affirm, because respondents acted in good faith and the state court's decision establishes the reasonableness of their position.

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reprinted in an appendix to this brief. App., *infra*, 1a-9a.

STATEMENT

A. Statutory Background

1. A bankruptcy proceeding begins when a debtor files a bankruptcy petition and typically ends when the bankruptcy court grants the debtor a discharge. The filing of the petition triggers an automatic stay that generally bars creditors from collecting debts while the bankruptcy proceeding is pending. See 11 U.S.C. 362(a). Entry of the discharge order relieves the debtor of liability for most debts that accrued before the bankruptcy filing. See 11 U.S.C. 727, 944, 1141, 1228, 1328. The discharge order "operates as an injunction," barring creditors from attempting to "collect, recover or offset any such debt." 11 U.S.C. 524(a)(2).

Disputes sometimes arise about whether the discharge order applies to a particular debt, because not all debts are discharged in bankruptcy. See 11 U.S.C. 523(a), 1328(a). In a Chapter 7 case (like this one) the discharge order typically is a form order that does not specify which of the debtor's debts are and are not discharged. J.A. 59-62 (discharge order in this case); see U.S. Courts, *Official Form 318*, at 1, perma.cc/2LPL-F2DG.

Further, with a few enumerated exceptions, debtors and creditors are not required to obtain advance determinations from the bankruptcy court about whether a discharge order covers a particular debt. See, *e.g.*, 11 U.S.C. 523(c)(1) (listing debts that are discharged unless a party obtains an advance determination from the court). Instead, the parties may wait

and, if needed, obtain a determination about dischargeability later from a state or federal court. See 28 U.S.C. 1334(b) (concurrent jurisdiction); Fed. R. Bankr. P. 4007 & advisory committee's note (1987) (authorizing debtor or creditor to obtain a ruling on dischargeability of a debt and recognizing that bankruptcy and nonbankruptcy courts have concurrent jurisdiction).

2. The Bankruptcy Code does not specify a particular remedy for the situation in which a creditor attempts to collect a debt in violation of a discharge order. Instead, the Code vests the bankruptcy court with broad discretionary authority, stating that the court "may" issue any "order, process, or judgment" that is "necessary or appropriate" to enforce its own orders. 11 U.S.C. 105(a). That includes the authority to hold a creditor in contempt of court. See, *e.g.*, *First State Bank of Roscoe* v. *Stabler*, 914 F.3d 1129, 1140 (8th Cir. 2019); see also Fed. R. Bankr. P. 9020 (recognizing bankruptcy court's contempt authority).

Contempt orders are equitable and discretionary. See, *e.g.*, *Chambers* v. *NASCO, Inc.*, 501 U.S. 32, 44-45 (1991); *Jove Eng'g, Inc.* v. *IRS*, 92 F.3d 1539, 1545-1546 (11th Cir. 1996). Even when a person violates a discharge order, the court may "refuse to hold [the] person[] in contempt." *In re Revere Copper & Brass, Inc.*, 29 B.R. 584, 588-589 (Bankr. S.D.N.Y. 1983). The court also may take steps short of holding the person in contempt to remedy the violation. See 11 U.S.C. 105(a) (authorizing any "order, process, or judgment").

3. In two circumstances not present here, Congress specified remedies for particular violations of bankruptcy court orders.

First, Congress required the bankruptcy court to award damages for certain "willful" violations of the automatic stay that cause injury. See 11 U.S.C. 362(k)(1) ("an individual injured by any willful violation of" the automatic stay "shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages," subject to a specific good-faith exception).

Second, Congress authorized a damages award against the United States when an Internal Revenue Service employee "willfully" violates a court order by collecting taxes. See 26 U.S.C. 7433(e)(1) (taxpayer may seek damages "[i]f, in connection with any collection of Federal tax with respect to a taxpayer, any officer or employee of the Internal Revenue Service willfully violates" an automatic stay or discharge order). Congress made that the exclusive remedy for such violations and required that all claims be brought within two years. See 26 U.S.C. 7433(d)(3), (e)(2)(A).

B. Factual Background

The dispute in this case stems from an agreement to build a business park in Sherwood, Oregon. Pet. App. 4a, 25a. Petitioner, respondent Keith Jehnke, and predecessors-in-interest to respondent Terry Emmert agreed to form respondent Sherwood Park Business Center, LLC (SPBC). *Id.* at 25a-26a. The agreement specified that each of them would obtain an ownership share in SPBC. *Id.* at 25a. Petitioner, a general contractor, agreed to be responsible for managing the construction and operation of the business park. *Ibid.*

Petitioner began having serious financial problems. Pet. App. 25a. He stopped paying state and federal payroll taxes and began using SPBC funds for his

own personal use. *Id.* at 25a-26a. Petitioner then "disappeared." J.A. 103.

Jehnke took over management of the business park. Pet. App. 26a. He discovered that petitioner had wrongfully appropriated approximately $30,000 of SPBC funds for his own use. *Ibid.* SPBC initiated an arbitration proceeding against petitioner; the arbitrator found petitioner liable for breach of fiduciary duty and conversion and ordered him to repay the funds. *Ibid.*

Petitioner and his lawyer, John Berman, decided that petitioner would sell his ownership interest in SPBC to Berman for $200,000. Pet. App. 27a. That sale violated the express terms of the parties' contract, which prohibited one SPBC member from transferring his ownership interest to a third party without the consent of the other members, and also gave the other members rights of first refusal. *Id.* at 25a.

C. State Court Proceedings

1. SPBC sued petitioner and Berman in Oregon state court to unwind petitioner's transfer to Berman and remove petitioner as an owner of the company. Pet. App. 5a, 22a. On the eve of trial, petitioner filed a Chapter 7 bankruptcy petition, and the state-court case was stayed. *Ibid.*

Petitioner ultimately received a discharge of his debts. Pet. App. 5a. The discharge order was a form order that simply granted petitioner a discharge and did not specify which of his particular debts were and were not discharged. J.A. 60.

The state-court case then resumed. Petitioner filed a motion to dismiss the claims against him in light of his bankruptcy. Pet. App. 6a. The trial court denied the motion, noting the parties' agreement that

no money judgment would be entered against petitioner because of his bankruptcy discharge. *Ibid.* Petitioner was represented by Berman at trial but did not appear or testify. *Id.* at 28a. Petitioner did participate in the litigation in other ways, including by appearing for a deposition and by maintaining his claim for attorneys' fees. *Id.* at 5a-7a, 30a; J.A. 88-89.[1]

2. The state court entered judgment in favor of SPBC, unwinding petitioner's sale to Berman and allowing Emmert and Jehnke to buy out petitioner's interest at fair market value. Pet. App. 6a, 22a-23a. The judgment stated that any party could petition for attorneys' fees. *Id.* at 6a. Under the relevant state rule, the parties had to request attorneys' fees within 14 days. See Or. R. Civ. P. 68(C)(4)(a).

SPBC, Emmert, and Jehnke, represented by attorney Stuart Brown, petitioned for attorneys' fees from petitioner. Pet. App. 6a.[2] They relied on the parties' contract, which expressly authorized the prevailing party in any contract-related dispute to recover attorneys' fees. J.A. 76-77 (citing parties' contract). They "alerted the state court to the existence of" the discharge order, Pet. App. 6a, and then argued that, under circuit precedent, the order did not bar an award of attorneys' fees because petitioner had "returned to

---

[1] Petitioner had filed a counterclaim for attorneys' fees in the state-court case and had listed that potential award as a contingent asset in his bankruptcy proceeding. Pet. App. 5a, 27a. When he moved to dismiss SPBC's claim against him, he did not move to dismiss his counterclaim. *Id.* at 28a; Br. in Opp. App. 16a.

[2] Brown passed away in 2013. Pet. App. 8a n.3. Respondent Shelley Lorenzen, his surviving spouse, is the executor of his estate. *Ibid.*

the fray" in the state-court litigation, *id.* at 6a-7a; J.A. 79, 88-89. Under the "return to the fray" doctrine, a litigant who actively engages in litigation after filing for bankruptcy can be liable for attorneys' fees in that litigation, even if the litigation concerns a pre-petition obligation. See Pet. App. 7a; see also *In re Ybarra*, 424 F.3d 1018, 1024 (9th Cir. 2005). Respondents limited their request to attorneys' fees incurred post-discharge. Pet. App. 6a, 29a; J.A. 90.

Petitioner conceded that the state court had jurisdiction to decide whether the discharge order applied to the attorneys' fees request. J.A. 94. And he agreed that *Ybarra* was the controlling law. J.A. 65. He argued that the discharge order barred any award of attorneys' fees because he had not actively participated in the state-court litigation post-discharge. Pet. App. 7a; J.A. 65-66, 92.

The state court agreed with respondents. J.A. 96-99. It held that the discharge order did not bar post-discharge attorneys' fees because petitioner had "returned to the fray" in the state-court litigation. Pet. App. 7a; see J.A. 96-99. The court awarded approximately $45,000 in attorneys' fees, only to SPBC. Pet. App. 7a; J.A. 112.

D. Federal Contempt Proceedings

1. Before the state court ruled on the attorneys' fees issue, petitioner moved to reopen his bankruptcy case. Pet. App. 23a. He asked the court to hold SPBC, Emmert, Jehnke, and Brown in contempt of court because (in his view) their request for attorneys' fees in the state-court case violated the discharge order. *Ibid.*

The bankruptcy court declined to impose contempt sanctions. Br. in Opp. App. 12a-35a. It concluded that respondents had not violated the discharge order at all because petitioner's post-discharge participation in

the state-court litigation meant he had "reenter[ed] the fray" and could be liable for attorneys' fees. *Id.* at 33a-35a.

The district court reversed. Br. in Opp. App. 1a-11a. It held that petitioner had not "return[ed] to the fray" and remanded for the bankruptcy court to consider whether respondents knowingly violated the discharge injunction. *Id.* at 11a.[3]

2. On remand, the bankruptcy court imposed contempt sanctions. Pet. App. 52a-75a. The bankruptcy court stated that contempt sanctions are justified when an alleged contemnor's violation of a discharge order is "willful," meaning that the person is "aware of the discharge injunction" and "intended the actions that violated" it. *Id.* at 58a, 60a (internal quotation marks omitted). The court acknowledged that this effectively was a "strict liability" standard. *Id.* at 60a.

Applying that standard to this case, the court awarded petitioner more than $100,000 in attorneys' fees, emotional-distress damages, and punitive damages. Pet. App. 61a-62a, 65a-75a.

3. The bankruptcy appellate panel (BAP) reversed. Pet. App. 21a-51a. The BAP explained that the bankruptcy court used the "wrong legal standard," because civil contempt is appropriate only if the alleged contemnor was "aware of the discharge injunction *and* aware that it applied to his or her claim." *Id.* at 44a, 48a.

Here, the BAP noted, "the scope of the discharge order * * * was ambiguous." Pet. App. 46a. "[T]he order itself did not advise [respondents] of the scope

---

[3] Petitioner appealed the state trial court's decision, and the state appellate court agreed with the reasoning of the district court. J.A. 101-128.

of the injunction under the *Ybarra* rule," and respondents "could not possibly have been aware that the discharge injunction was applicable to their fee request until the *Ybarra* question was adjudicated." *Id.* at 50a-51a. Once the state court resolved that issue in respondents' favor, respondents "were entitled to rely on that decision." *Id.* at 47a.

Otherwise, the BAP explained, no creditor would ever be willing to "seek a court's ruling on the issue" of the scope of a discharge, for fear of contempt sanctions. Pet. App. 46a-47a. Indeed, the BAP "fail[ed] to see" how there was a violation of the discharge order at all, because all respondents had done was ask the state court to rule on an open issue about the scope of the discharge order. *Ibid.*

4. The court of appeals affirmed. Pet. App. 1a-15a. It explained that, to hold a person in contempt for violating a discharge order, the bankruptcy court must find that the person actually knew that the discharge order applied and violated it anyway. *Id.* at 11a.

Here, the court explained, respondents lacked the necessary knowledge. Pet. App. 12a. They "possessed a good faith belief that the discharge injunction did not apply to their claims" based on "the state court's judgment" so holding. *Id.* at 13a. Even if respondents ultimately were incorrect on that disputed legal issue, the court held, respondents should not be held in contempt. *Ibid.* In support of its holding, the court of appeals relied on circuit precedent stating that a "creditor's good faith belief that the discharge injunction does not apply to the creditor's claim precludes a

finding of contempt, even if the creditor's belief is unreasonable." *Id.* at 12a (citing *In re ZiLOG, Inc.*, 450 F.3d 996, 1009 n.14 (9th Cir. 2006)).[4]

SUMMARY OF ARGUMENT

A bankruptcy court should not hold a person in contempt of court for violating a discharge order when that person had a reasonable, good-faith belief that the discharge order did not apply to his conduct. Respondents plainly meet that standard, because they relied in good faith on a state-court decision in their favor. This Court therefore should affirm.

A. The Bankruptcy Code authorizes bankruptcy courts to take any "necessary or appropriate" steps to enforce their orders. 11 U.S.C. 105(a). Longstanding principles of contempt establish that it is neither "necessary" nor "appropriate" to impose contempt sanctions for violation of a court order when the person had good reason to believe the order did not apply to his conduct.

This Court has explained that contempt is a "potent weapon" designed to address "violation of a court order by one who fully understands its meaning but chooses to ignore its mandate." *International Longshoremen's Ass'n, Local 1291* v. *Philadelphia Marine*

---

[4] Respondents argued to the court of appeals that they had not violated the discharge order at all. Emmert et al. C.A. Br. 30-34; Brown C.A. Br. 28-32. The court "expressed no opinion" on the issue, Pet. App. 14a, so it remains open in the event of a remand.

Petitioner's statement (Br. 9 n.2, 10 n.4) that Lorenzen "conceded" a violation is mistaken. Although Lorenzen conditionally withdrew her cross-appeal because of new circuit precedent, she never conceded that circuit law barred respondents from seeking attorneys' fees at the time they filed the request, or that respondents violated the discharge order merely by asking a court to construe the scope of that order. See Br. in Opp. 24.

Trade Ass'n, 389 U.S. 64, 76 (1967). Because contempt is such a severe remedy, a person should not be held in contempt if "there is a fair ground of doubt as to the wrongfulness of [his] conduct." *California Artificial Stone Paving Co.* v. *Molitor*, 113 U.S. 609, 618 (1885). A reasonable, good-faith belief is enough to insulate a person from contempt sanctions, *Maness* v. *Meyers*, 419 U.S. 449, 470 (1975); *In re Watts*, 190 U.S. 1, 32 (1903), but good faith, standing alone, is not, *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187, 192 (1949).

The reasonable, good-faith belief standard is fair and workable. Bankruptcy courts already use that standard in a variety of contexts. Many provisions of the Code depend on good faith. In assessing good faith, bankruptcy courts do not look solely to the litigant's stated subjective belief but instead probe the basis for that belief using objective factors.

In the decision below, the court of appeals declined to impose contempt sanctions based on respondents' good-faith reliance on the state-court decision in their favor. In its opinion, the court suggested that a good-faith belief would insulate a creditor from contempt sanctions even if that belief was "unreasonable." The court of appeals' language about an unreasonable belief was dictum. The court did not rely on it in this case. Instead, it reviewed the reasons why respondents did not believe the discharge order barred their request and concluded that, because respondents relied on the state court's decision in their favor, they could not be held in contempt.

B. The federal government proposes a legal rule that is substantially the same. Under the government's rule, a creditor cannot be held in contempt for violating a discharge order if there is a "fair ground of doubt" as to whether the order applies to his conduct.

U.S. Br. 15 (quoting *California Artificial Stone Paving Co.*, 113 U.S. at 618). Although the government's standard is primarily an "objective" one (*id.* at 11), the government leaves room for bankruptcy courts to consider good faith and bad faith. In particular, while "subjective good-faith belief, standing alone, does not preclude a finding of civil contempt," "a defendant's subjective good-faith belief that it is complying with an injunction might sometimes be relevant to the determination whether the belief was objectively unreasonable." *Id.* at 23.

Under both approaches, contempt is inappropriate here, because it is undisputed that respondents acted in good faith, and they plainly had "fair ground" to doubt that the discharge order barred their attorneys' fees request.

C. Petitioner proposes a sharply different rule. In his view, a creditor must be held in contempt if he was aware of a discharge order and intentionally took the actions that violated it. That is a near-strict-liability rule that leaves no room for reasonable actions taken in good faith.

Petitioner's rule cannot be reconciled with the discretionary and flexible language of the Bankruptcy Code. Section 105 states that the court "may" take actions "necessary or appropriate" to enforce its orders – not that it must impose sanctions for any order violation. When Congress wanted to require the bankruptcy court to impose sanctions, it used mandatory language. See 11 U.S.C. 362(k)(1). Further, petitioner ignores the longstanding equitable principles that make contempt sanctions inappropriate when a person has a reasonable, good-faith belief that he is complying with the relevant court order.

Petitioner claims his rule is necessary to ensure that debtors have a fresh start upon discharge. But his rule treats contempt as a mere cost-shifting rule, not as the "potent weapon" this Court has described. Further, petitioner's rule would upset Congress's careful balancing of interests in the Bankruptcy Code because it would put a heavy weight on the scales in favor of debtors even after their bankruptcy proceedings have concluded. As the government explains, that "would unduly hinder a creditor's legitimate efforts to collect non-discharged debts." U.S. Br. 27.

Perhaps recognizing the harshness of his rule, petitioner states that a creditor can avoid contempt by seeking an advance bankruptcy court ruling before attempting to collect on a debt. Pet. Br. 11, 14-15, 23 n.12. That requirement is inconsistent with the Bankruptcy Code, which mandates advance determinations in only a few specified circumstances. It also is inconsistent with petitioner's policy argument, because a debtor would have to bear his own costs litigating dischargeability in bankruptcy court. And even if a party were required to seek an advance determination, respondents did so here. Petitioner's only response is that respondents should have gone to the bankruptcy court, rather than state court. But the state court had concurrent jurisdiction to decide the issue. And once the parties ultimately were in bankruptcy court, that court also decided the issue in respondents' favor.

D. The Court should affirm the court of appeals' judgment. Under any standard except petitioner's, respondents should not be held in contempt. Neither the discharge order nor the Bankruptcy Code made clear whether respondents' claim for post-discharge attorneys' fees was impermissible under the discharge

order. Circuit precedent supported respondents' argument for attorneys' fees, and both the state court and the bankruptcy court agreed with respondents' view. There is no question that respondents acted in good faith. Under this Court's precedents, there can be no contempt. See *California Artificial Stone Paving Co.*, 113 U.S. at 618 ("[I]f the judges disagree there can be no judgment of contempt."). The Court should affirm the judgment below.

ARGUMENT

A BANKRUPTCY COURT SHOULD NOT HOLD A CREDITOR IN CONTEMPT FOR VIOLATING A DISCHARGE ORDER WHEN THE CREDITOR HAS A REASONABLE, GOOD-FAITH BELIEF THAT THE ORDER DOES NOT PROHIBIT HIS CONDUCT

The question in this case is whether a person should be held in contempt of bankruptcy court for violating a discharge order when he relied in good faith on a state-court decision holding that the discharge order did not apply to his conduct. The answer is no. The bankruptcy court has the discretion to impose contempt sanctions when "necessary or appropriate." 11 U.S.C. 105(a). It is neither necessary nor appropriate to hold a person in contempt when he had a reasonable, good-faith belief that the order did not apply to his conduct. The government substantially agrees.

Petitioner advocates a near-strict-liability rule, one that would require creditors be held in contempt even when they have good reason to believe they are complying with a court order. That rule cannot be reconciled with the permissive, flexible text of Section 105 or with the serious nature of contempt. And it would be bad for the bankruptcy system because it would skew too far in favor of debtors and would chill

creditors from collecting on non-discharged debts. The Court should reject that approach.

A. Under Section 105 And Traditional Principles Of Contempt, A Reasonable, Good-Faith Belief Precludes Contempt Sanctions

The bankruptcy court has the authority to take any action "necessary or appropriate" to enforce a discharge order. 11 U.S.C. 105(a). Under the traditional equitable principles governing contempt, it is not "necessary" or "appropriate" for a court to hold a person in contempt when that person had a reasonable, good-faith belief that the order did not apply to his conduct.

1. Section 105 authorizes bankruptcy courts to impose contempt sanctions when "necessary or appropriate" to enforce court orders

This case concerns a bankruptcy court's enforcement of a discharge order. The analysis starts with 11 U.S.C. 105(a), the provision of the Bankruptcy Code that gives bankruptcy courts the authority to enforce their own orders. It states:

> The court *may* issue any order, process, or judgment that is *necessary or appropriate* to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination *necessary or appropriate* to enforce or implement court orders or rules, or to prevent an abuse of process.

Ibid. (emphases added).

Section 105(a), by its plain language, gives bankruptcy courts broad discretionary authority to address order violations, including through contempt sanctions. The use of the word "may" establishes that the courts' authority is discretionary, not mandatory. See, *e.g.*, *Lopez* v. *Davis*, 531 U.S. 230, 241 (2001). The words "necessary or appropriate" give bankruptcy courts "broad equitable power" to decide how to effectuate their orders. *Johnson* v. *Home State Bank*, 501 U.S. 78, 88 (1991); see *Marrama* v. *Citizens Bank of Mass.*, 549 U.S. 365, 375 (2007). And the authorization to use "any order, process, or judgment" to "enforce * * * court orders" establishes that bankruptcy courts have a range of options available, including contempt and measures less severe than contempt. See *First State Bank of Roscoe* v. *Stabler*, 914 F.3d 1129, 1140 (8th Cir. 2019) (Section 105 authority includes contempt authority).[5]

---

[5] Many lower courts have held that bankruptcy courts have inherent authority (in addition to statutory authority) to enforce their orders through contempt. See Barbara D. Gilmore, *Contempt and Sanction Powers of the Bankruptcy Court*, 18 J. Bankr. L. & Prac. 6 Art. 1, at n.43 (2009) (citing cases); see also Pet. Br. 18-19; U.S. Br. 4. This Court has not definitively decided the issue. See *Law* v. *Siegel*, 571 U.S. 415, 420-421 (2014) (bankruptcy courts "may * * * possess" inherent authority to sanction abusive litigation practices). There is no need to address inherent authority here, because the bankruptcy court imposed sanctions under its Section 105 authority, Pet. App. 12a n.4, and no party has argued that the bankruptcy court's inherent contempt authority is broader than its statutory contempt authority.

2. *It is neither "necessary" nor "appropriate" to hold a person in contempt for violating a court order when he has a reasonable, good-faith belief that his conduct is allowed*

Whether it is "necessary" or "appropriate" to hold a litigant in contempt for violating a bankruptcy discharge order is informed by traditional equitable principles that apply in contempt proceedings.

"Recognizing the contempt power's virility and damage potential, courts have created a number of prudential principles designed to oversee its deployment." *Project B.A.S.I.C.* v. *Kemp*, 947 F.2d 11, 16 (1st Cir. 1991). It is appropriate to read Section 105 in conjunction with those principles, because the words "necessary and appropriate" incorporate equitable principles, *Johnson*, 501 U.S. at 88, and contempt is itself equitable in nature, see, *e.g.*, *Leman* v. *Krentler-Arnold Hinge Last Co.*, 284 U.S. 448, 457 (1932).

Three related equitable principles apply here. Those principles, taken together, establish that when a creditor believes in good faith that an ambiguous discharge order does not apply to his conduct, it is neither "necessary" nor "appropriate" to hold him in contempt.

a. Contempt is a severe sanction, designed for deliberate disobedience of a court order

First, contempt of court is a serious sanction, designed for the situation in which a person deliberately disobeys a court order. "Contempt is a disregard of, or disobedience to, the rules or orders of a legislative or judicial body." Edward M. Dangel, *Contempt* § 1, at 2 (1939) (cited in *Black's Law Dictionary* 385 (10th ed. 2014, definition of "contempt")); see, *e.g.*, *Miriam-*

Webster's Collegiate Dictionary 250 (10th ed. 1996) (defining "contempt" as "willful disobedience to or open disrespect of a court, judge, or legislative body").

Contempt is a "severe remedy." *California Artificial Stone Paving Co.* v. *Molitor*, 113 U.S. 609, 618 (1885). Being held in contempt is stigmatizing, even apart from any monetary sanctions that might be imposed. See, *e.g.*, *Mitchell* v. *Helena Wholesale, Inc.*, 163 F. Supp. 101, 105 (E.D. Ark. 1958) (noting the "serious stigma" that attaches to a contempt finding). Attorneys held in contempt may be required to disclose that fact to other courts, see, *e.g.*, D.D.C. Local Civ. R. 83.15(b), or may be reported to the state bar, see, *e.g.*, Cal. Bus. & Prof. Code § 6086.7(a). See also *SerVaas Inc* v. *Mills*, 661 Fed. Appx. 7, 9-10 (2d Cir. 2016) (civil-contempt order caused attorneys "reputational harm").

Because contempt is such a serious sanction, it should be imposed sparingly and only when deserved. A court is never required to hold a person in contempt; contempt is discretionary. See Judiciary Act of 1789 § 17, 1 Stat. 83 (giving federal courts "the power * * * to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any case or hearing before same"); see also 18 U.S.C. 401 (power of federal court to punish contempt is "at its discretion"). This Court has explained that a court has "various methods by which to ensure compliance with its remedial orders" short of contempt, and it should consider those measures before imposing contempt sanctions. *Spallone* v. *United States*, 493 U.S. 265, 275-276 (1990). Consistent with that view, the Court has repeatedly cautioned that, "in selecting contempt sanctions, a court is obliged to use the least possible power adequate to the end proposed." *Id.* at 276; see *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 481

U.S. 787, 801-802 (1987); *Shillitani* v. *United States*, 384 U.S. 364, 371 & n.9 (1966). The courts of appeals have recognized and applied that principle in civil contempt cases. See *Gascho* v. *Global Fitness Holdings, LLC*, 875 F.3d 795, 799 (8th Cir. 2017) ("Contempt is a measure of last resort, not first resort.").[6]

Accordingly, the starting point is that contempt is serious, and so it generally should be reserved for a "violation of a court order by one who fully understands its meaning but chooses to ignores its mandate." *International Longshoremen's Ass'n, Local 1291* v. *Philadelphia Marine Trade Ass'n*, 389 U.S. 64, 76 (1967).

b. A person should not be held in contempt for violating a court order if he has good reason to believe the order does not apply to his conduct

It has long been established that, because contempt is such a serious sanction, a person should not be held in contempt for violating a court order unless it is clear that the order applies to his conduct.

This Court stated that principle in *California Artificial Stone Paving Co.* v. *Molitor*, 113 U.S. 609 (1885). That case concerned whether a person could be held in contempt for violating an injunction not to infringe a competitor's patents for concrete pavement, when the alleged infringer had "varied his mode of making the pavement" and so it was unclear whether the injunction barred his conduct. *Id.* at 612-613. The Court explained that, because contempt is a "severe remedy," it "should not be resorted to where there is

---

[6] See also, *e.g.*, *Ohlander* v. *Larson*, 114 F.3d 1531, 1541 (10th Cir. 1997); *Natural Gas Pipeline Co. of Am.* v. *Energy Gathering, Inc.*, 86 F.3d 464, 467-469 (5th Cir. 1996); *Project B.A.S.I.C.*, 947 F.2d at 16.

fair ground of doubt as to the wrongfulness of the defendant's conduct." *Id.* at 618. The Court remanded the case, stating that, "if the judges [on the court of appeals] disagree" as to whether the injunction applies, "there can be no judgment of contempt." *Ibid.*

The Court applied the same principle in *International Longshoremen's Ass'n, Local 1291* v. *Philadelphia Marine Trade Ass'n*, 389 U.S. 64 (1967). The issue there was whether a labor union could be held in contempt for violating a court order that did not specify the acts prohibited. *Id.* at 73-74. This Court said no: Because "the judicial contempt power is a potent weapon," it cannot be "founded upon a decree too vague to be understood." *Id.* at 76. Contempt is reserved for "a violation of a court order by one who fully understands its meaning but chooses to ignore its mandate." *Ibid.*; see also *Schmidt* v. *Lessard*, 414 U.S. 473, 476 & n.2 (1974) (per curiam) (stating the same rule).

The courts of appeals all recognize that a person cannot be held in contempt for violating a court order unless the order clearly applies to his conduct. Most circuits articulate the principle as a requirement that an order be "clear and unambiguous" (or "specific and definite") before it can serve as a basis for contempt.[7]

---

[7] See, *e.g.*, *Project B.A.S.I.C.*, 947 F.2d at 16 (civil contempt is appropriate "only if the putative contemnor has violated an order that is clear and unambiguous"); *In re General Motors Corp.*, 61 F.3d 256, 259 (4th Cir. 1995) (order must be "clear and unequivocal"); *Grace* v. *Center for Auto Safety*, 72 F.3d 1236, 1241 (6th Cir. 1996) (order must be "clear and unambiguous" (internal quotation marks omitted)); *SEC* v. *Hyatt*, 621 F.3d 687, 692 (7th Cir. 2010) (contempt appropriate only when order "sets forth an unambiguous command"); *Imageware, Inc.* v. *U.S. W. Comm'ns*, 219 F.3d 793, 797 (8th Cir. 2000) ("No one should be held in contempt for violating an ambiguous order."); *Balla* v. *Idaho State Bd. of*

The Federal Circuit employs the "fair ground of doubt" standard (*California Paving* was, after all, a patent case). See *Tivo Inc.* v. *Echostar Corp.*, 646 F.3d 869, 882 (Fed. Cir. 2011) (en banc). The Third Circuit asks whether there is "ground to doubt the wrongfulness of the conduct." *Fox* v. *Capital Co.*, 96 F.2d 684, 686 (3d Cir. 1938); see *FTC* v. *Lane Labs-USA, Inc.*, 624 F.3d 575, 582 (3d Cir. 2010). And the Second Circuit asks whether there is a "fair ground of doubt" about whether the order applies, which depends in part on whether the order was "clear and unambiguous." *King* v. *Allied Vision, Ltd.*, 65 F.3d 1051, 1058 (2d Cir. 1995). In applying those rules, courts construe ambiguities in favor of the alleged contemnor. See, *e.g.*, *Axia NetMedia Corp.* v. *Massachusetts Tech. Park Corp.*, 889 F.3d 1, 13 (1st Cir. 2018); *Gascho*, 875 F.3d at 800; *Chao* v. *Gotham Registry, Inc.*, 514 F.3d 280, 292 (2d Cir. 2008); *Grace*, 72 F.3d at 1241.

Despite the variations in language, the principle is the same: A person cannot be held in contempt for violating an ambiguous order. This rule rests on basic notions of notice and fairness. See *Schmidt*, 414 U.S. at 476 ("[B]asic fairness requires that those enjoined receive explicit notice of precisely what conduct is outlawed."); *Gascho*, 875 F.3d at 800 ("[I]t would be unfair for courts to hold a party in contempt unless that party was disobeying a clear and unequivocal court

---

Corr., 869 F.2d 461, 465 (9th Cir. 1989) ("[C]ontempt is appropriate only when a party fails to comply with a court order that is both specific and definite."); *Reliance Ins. Co.* v. *Mast Constr. Co.*, 84 F.3d 372, 376 (10th Cir. 1996) (order must be "clear and unambiguous" to support contempt); *Georgia Power Co.* v. *NLRB*, 484 F.3d 1288, 1291 (11th Cir. 2007) (order must be "clear and unambiguous"); *Armstrong* v. *Executive Office of President*, 1 F.3d 1274, 1289 (D.C. Cir. 1993) (order must be "clear and unambiguous" (internal quotation marks omitted)).

command."); *Inmates of Allegheny Cty. Jail* v. *Wecht*, 754 F.2d 120, 129 (3d Cir. 1985) (no contempt unless putative contemnors "have been given specific notice of the norm to which they must pattern their conduct"). If there is a reasonable basis to believe that the order does not apply, then the putative contemnor lacks the necessary notice, and he cannot be said to have deliberately disregarded the court's command. *International Longshoremen's Ass'n*, 389 U.S. at 76. And if a court already has held that the order is inapplicable, then the putative contemnor necessarily has that reasonable basis. *California Artificial Stone Paving Co.*, 113 U.S. at 618.

c. Good faith and bad faith matter in contempt proceedings

Because contempt is a sanction for "deliberate defiance" of a court order, *Maggio* v. *Zeitz*, 333 U.S. 56, 76 (1948), good faith and bad faith matter. That understanding is consistent with the ordinary meaning of the word "contempt," which suggests more than a mere failure to follow a court's order, but "scorn." *Oxford English Dictionary* 813 (2d ed. 1989).

This Court has recognized the importance of good faith in determining where a party that acted reasonably should be held in contempt. In *In re Watts*, 190 U.S. 1 (1903), this Court considered whether a federal district court exercising bankruptcy jurisdiction should hold an attorney in contempt when he acted on a good-faith belief that state courts (rather than federal courts) had jurisdiction over certain property and had a state-court order to that effect. *Id.* at 26, 29. This Court held that there could be no contempt, because the attorney "act[ed] in good faith and in the honest belief that his advice [was] well founded," and "the state court agreed" with him. *Id.* at 29, 32. The Court emphasized both the attorney's "good faith" and

the fact that he relied on a state-court ruling. See *id.* at 27, 29, 32 (repeatedly noting the attorney's good faith); *id.* at 29-30 (state court's jurisdiction "had been properly invoked, and been properly exercised, and was not open to collateral attack"). In reaching its conclusion, the Court did not rely solely on the objective reasonableness of the attorney's belief: "Want of intention to commit contempt is entitled to great weight in such circumstances." *Id.* at 35.

The Court similarly considered reasonable good faith in *Maness* v. *Meyers*, 419 U.S. 449 (1975). In that case, the lower court had held an attorney in contempt for advising his client to invoke the Fifth Amendment privilege against compelled self-incrimination in response to a subpoena for obscene materials in the client's possession. *Id.* at 451-452, 455. The Court reversed, emphasizing both the sincerity of the lawyer's belief and its reasonableness. The Court noted that the lawyer believed in "good faith" that the material would be incriminating. *Id.* at 458; see *id.* at 455 (noting that "the record shows no indication whatsoever of contumacious conduct" and that the lawyer's "good-faith belief" was undisputed); *id.* at 463 ("[T]he issue here is whether petitioner, as counsel, can be penalized for good-faith advice to claim the privilege."). And the Court probed the basis for that belief, concluding that the attorney had, "at the very least, a reasonable basis" to believe the subpoenaed materials were incriminating. *Id.* at 469. Because the attorney had a reasonable, good-faith basis for the advice he gave, he could not be held in contempt. *Id.* at 470.

This Court's decision in *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187 (1949), is not to the contrary. That decision stands for the proposition that a good-faith belief, without more, is insufficient to avoid contempt. In *McComb*, the Court upheld civil contempt

sanctions against an employer who had failed to comply with an injunction entered to enforce the federal labor laws. *Id.* at 189. The Court rejected the employer's subjective good-faith defense: "An act does not cease to be a violation of a law and of a decree merely because it may have been done innocently." *Id.* at 191; see *Merrimack River Sav. Bank* v. *City of Clay Ctr.*, 219 U.S. 527, 536 (1911) ("honest[] belie[f]" by itself is not enough to avoid contempt). (The Court also suggested that the employer was acting in bad faith, noting that the employer had a "record of continuing and persistent violations." *McComb*, 336 U.S. at 192; see U.S. Br. 26.)

At the same time, the *McComb* Court recognized that a person who acted reasonably *and* in good faith could avoid contempt sanctions. The Court noted that, rather than stick its head in the sand and risk contempt sanctions, the employer could have sought "clarification" from a court about the scope of the order. *McComb*, 336 U.S. at 192. If the employer had done so, the Court suggested, it would not face contempt sanctions. *Id.* at 192-193. The Court thus did not hold that a reasonable, good-faith belief in the legality of one's conduct is "irrelevant" (Pet. Br. 14); indeed, it suggested the opposite. And *McComb* certainly should not be read to definitively resolve that issue, both because the Court apparently believed the employer was acting in bad faith, and because the Court did not consider any reasonable basis for the employer's belief. When the putative contemnor has had a reasonable, good-faith belief that his conduct did not violate a court order, as in *Watts* and *Maness*, the Court has refused to impose contempt sanctions.[8]

---

[8] In explaining why a subjective good-faith belief was not itself enough to avoid contempt, the *McComb* Court stated that "it

Finally, this Court has suggested that bad faith itself may be a sufficient basis to impose contempt sanctions. Courts generally can impose sanctions "when a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *Chambers* v. *NASCO, Inc.*, 501 U.S. 32, 45-46 (1991) (citing cases) (internal quotation marks omitted). That includes when a party has "show[n] bad faith by * * * hampering enforcement of a court order." *Hutto* v. *Finney*, 437 U.S. 678, 689 n.14 (1978); see *Marrama*, 549 U.S. at 383 (Alito, J., dissenting) (bankruptcy courts may "craft various remedies for a range of bad faith conduct," including "holding the debtor in contempt").

Accordingly, this Court's decisions establish that a court exercising its discretionary, equitable contempt authority may take good faith and bad faith into account. An asserted good-faith belief by itself generally is not enough to avoid contempt sanctions, but a reasonable, good-faith belief is sufficient. The courts of appeals have recognized these principles as well.[9]

---

matters not with what intent the defendant did the prohibited act." 336 U.S. at 191. Petitioner interprets (Br. 13) that language to prohibit any consideration of good faith and bad faith in imposing contempt sanctions. But the language must be read in context and consistent with the Court's other decisions.

[9] See, *e.g.*, *Chao*, 514 F.3d at 293 (no contempt when defendant made "diligent and energetic efforts to comply in a reasonable manner" with a court order); *Harley-Davidson, Inc.* v. *Morris*, 19 F.3d 142, 149 (3rd Cir. 1994) (recognizing that "a good faith and reasonable interpretation of a court order" can preclude contempt); *Illinois Migrant Council* v. *Pilliod*, 540 F.2d 1062, 1071 n.11 (7th Cir. 1976) (a court should not hold in contempt those "who act in good faith and who reasonably believe their actions are justifiable"); *In re Spencer*, 868 F.3d 748, 751-752 (8th Cir. 2017) (no contempt where the defendant "had a reasonable basis for believing" that its actions were permissible, "[e]ven if [it] was

That makes sense, because barring all consideration of good faith would be inconsistent with the Court's repeated admonition to impose contempt sanctions only when truly necessary. See *Gompers* v. *Buck's Stove & Range Co.*, 221 U.S. 418, 451 (1911) ("[T]he very amplitude of the [contempt] power is a warning to use it with discretion, and a command never to exert it where it is not necessary or proper.").

3. Respondents' rule is fair and administrable

a. A rule that allows for consideration of reasonable good faith is necessary for the fair and efficient administration of the bankruptcy system. Not all debts are discharged in bankruptcy. Although the Bankruptcy Code includes a list of exceptions to discharge, 11 U.S.C. 523(a), 1328(a), questions sometimes arise about whether those exceptions apply in a given case. Those questions typically are not answered within the four corners of the discharge order. Although injunctions in civil cases generally must set out their terms with specificity, see Fed. R. Civ. P. 65(d), that requirement does not apply to discharge orders. And, for most debts, debtors and creditors are not required to determine dischargeability in advance. See 11 U.S.C.

---

wrong on the merits"); *Vertex Distrib., Inc.* v. *Falcon Foam Plastics, Inc.*, 689 F.2d 885, 890 (9th Cir. 1982) ("[I]f a defendant's action appears to be based on a good faith and reasonable interpretation of (the court's order), he should not be held in contempt." (internal quotation marks omitted)); *Spectra Sonics Aviation, Inc.* v. *Ogden City*, 931 F.2d 63, 1991 WL 59369, at *2 (10th Cir. Apr. 19, 1991) (Tbl.) ("[A] defendant may be absolved from a finding of civil contempt if * * * the defendant's action appears to be based on a good faith and reasonable interpretation of the order."); *Newman* v. *Graddick*, 740 F.2d 1513, 1525 (11th Cir. 1984) ("[A] person who attempts with reasonable diligence to comply with a court order should not be held in contempt.").

523(c)(1) (specifying that only three of nineteen categories of debt are exempted from discharge without a prior determination of dischargeability); *United Student Aid Funds, Inc.* v. *Espinosa*, 559 U.S. 260, 268-269 (2010) (debtor must file an adversary complaint in his bankruptcy case to discharge student loan debt). Accordingly, in Chapter 7 cases, bankruptcy courts use a form order that simply states that a "discharge * * * is granted" to the debtor and does not specify which debts are and are not covered by the order. See U.S. Courts, *Official Form 318*, at 1, perma.cc/2LPL-F2DG.[10]

The reasonable, good-faith belief standard fairly accounts for occasional uncertainties about the scope of a discharge order. A discharge order operates as an injunction, and creditors must comply with it. 11 U.S.C. 524(a)(2). But if a creditor believes, in good faith and for good reason, that the discharge order does not apply to his conduct, then he has not "deliberate[ly] defi[ed]" (*Maggio*, 333 U.S. at 76) the discharge order and should not be branded a contemnor. If every creditor who violated a discharge order were held in contempt no matter the circumstances, it would discourage creditors from attempting to collect on non-discharged debts, effectively expanding the scope of discharge orders. And it would serve as a strong disincentive for attorneys to take on cases for creditors to collect on non-discharged debts. See *Watts*, 190 U.S. at 35 (attorneys must be able to "fearless[ly] discharge * * * their dut[ies]" without facing

---

[10] The form states that "[m]ost debts are covered by the discharge, but not all"; gives some examples of debts that are not discharged ("domestic support obligations," "most taxes," and "most student loans"); and warns that "the law is complicated" and so "you should consult an attorney to determine the exact effect of a discharge in this case." *Official Form 318* at 1-2.

contempt sanctions). Here, for example, petitioner sought contempt sanctions not only against his former business partners, but also against their lawyer. Pet. App. 55a.

This case proves the need for a reasonable, good-faith standard. Respondents did everything right. They believed, based on circuit precedent, that they could obtain attorneys' fees from petitioner based on his post-discharge conduct. Since they were already in state court (and had only 14 days to seek attorneys' fees, see Or. R. Civ. P. 68(C)(4)(a)), they informed the state court of petitioner's discharge order and asked the state court to resolve whether the order allowed them to seek attorneys' fees. Petitioner did not object. The state court held that the discharge order did not bar attorneys' fees, and respondents reasonably relied on that holding.[11] As the BAP explained, respondents "should be praised, not sanctioned" (Pet. App. 47a) for their careful efforts to comply with the discharge order.[12]

This does not mean that a debtor has no remedy for violation of a discharge order. A court may order

---

[11] Petitioner contends (Br. 20 n.9, 22 n.11) that respondents could not rely on the state court's decision because it was contrary to the discharge order and therefore "void." But the state court was deciding the scope of the discharge order, which it had jurisdiction to do. Even if that decision later were overturned on appeal, respondents were entitled to rely on it at the time.

[12] In all events, punitive damages are inappropriate in this case. Respondents were not afforded the procedural protections necessary in criminal contempt proceedings, see *International Union, United Mine Workers of Am.* v. *Bagwell*, 512 U.S. 821, 833-834 (1994); they reasonably and in good faith attempted to comply with the discharge order; and the bankruptcy court's rationale for punitive damages makes no sense on its own terms, see Pet. App. 75a.

the creditor to comply with the discharge order (by, for example, returning property the creditor has collected). Further, the court's ruling will resolve the dischargeability issue going forward. See U.S. Br. 21.

b. A reasonable, good-faith belief rule is easily administrable, because the Bankruptcy Code requires bankruptcy courts to decide similar questions in a wide variety of circumstances. Many provisions in the Code expressly require good faith.[13] For example, a plan may not be confirmed unless it was "proposed in good faith." 11 U.S.C. 1129(a)(3), 1325(a)(3). In assessing "good faith," bankruptcy courts do not simply rely on the debtor's assertion of good faith, but instead look to the totality of the circumstances, including objective factors such as the plan's feasibility. See, *e.g.*, *In re Chaffin*, 816 F.2d 1070, 1074 (5th Cir. 1987); *In re Pertuset*, 492 B.R. 232, 250, 255-258 (Bankr. S.D. Ohio), aff'd, 485 B.R. 478 (B.A.P. 6th Cir. 2012).

Similarly, the Code authorizes a trustee to void fraudulent transfers by the debtor, but includes a safe harbor if the transferee accepted the debtor's property for value and in good faith. 11 U.S.C. 548(c), 550(b). Bankruptcy courts applying this provision routinely evaluate whether a transferee acted in good faith, considering both the transferee's subjective belief and objective factors, such as whether the transferee performed a "diligent investigation." *In re American Hous. Found.*, 785 F.3d 143, 164 (5th Cir. 2015) (internal quotation marks omitted); see, *e.g.*, *In re Taneja*, 743 F.3d 423, 430 (4th Cir. 2014) (reviewing transferee's belief and "the customary practices of the

---

[13] See, *e.g.*, 11 U.S.C. 362(c)(3)(B)-(C), (c)(4)(B), (c)(4)(D), (k)(2), (n)(1)(D); 11 U.S.C. 521(i)(4); 11 U.S.C. 548(c); 11 U.S.C. 550(b); 11 U.S.C. 1129(a)(3); 11 U.S.C. 1225(a)(3); 11 U.S.C. 1325(a)(3).

industry in which the transferee operates" (internal quotation marks omitted)).[14]

The point of these examples is not that the good-faith inquiry under each of the provisions is identical, but rather that bankruptcy courts routinely decide whether a party acted in good faith. Further, in doing so, bankruptcy courts do not simply accept a party's assertion of good faith but instead look behind that belief to determine the basis for it. Accordingly, there is no reason that it will be "difficult" for bankruptcy courts to make similar determinations in the context of enforcing discharge orders, or that creditors will be able to escape contempt by "conjur[ing] up pretextual reasons for pushing [a] discharge's limits." Pet. Br. 24.

4. The court of appeals correctly found contempt sanctions inappropriate, and its language about "unreasonable" good-faith beliefs is dictum

The court of appeals correctly recognized that, to find a creditor in contempt for violating a discharge order, the court must find that the creditor knew the order applied to his conduct but intentionally violated the order anyway. Pet. App. 11a; see *International Longshoremen's Ass'n*, 389 U.S. at 76 (contempt appropriate for "violation of a court order by one who fully understands its meaning but chooses to ignore its mandate"). The court also correctly determined that a person cannot meet that standard when he has

---

[14] Bankruptcy courts also have their own sanctions rule, which requires that filings be made in good faith and with sufficient legal basis. See Fed. R. Bankr. P. 9011 (parallel to Fed. R. Civ. P. 11). That rule requires consideration of both an attorney's beliefs and the basis for those beliefs. See, *e.g.*, *In re Mroz*, 65 F.3d 1567, 1573 (11th Cir. 1995).

a "good faith belief that the discharge injunction does not apply" to his conduct. Pet. App. 12a.

In determining whether respondents had such a good-faith belief, the court assessed both respondents' subjective beliefs and the objective basis for those beliefs. The court noted that it was undisputed that respondents "possessed a good faith belief that the discharge injunction did not apply to their claims." Pet. App. 13a. But the court did not stop there. Rather, the court of appeals, like the BAP before it, reviewed the facts establishing the basis for respondents' belief, including the circuit precedent on which their claim was based and the proceedings in state court. *Id.* at 10a; see *id.* at 46a-47a, 50a (BAP); see also *id.* at 44a (BAP's recognition that self-serving claim of good faith is not sufficient). The court of appeals explained that respondents "relied on the state court's judgment that the discharge injunction did not apply to their claim for post-petition attorneys' fees." *Id.* at 13a.

Petitioner (Br. 3, 10) and the government (Br. 21-22) focus on the court's language about "unreasonable" good faith beliefs. But that language was dictum. No one in this case ever suggested that respondents' belief was an unreasonable one, and the court of appeals did not find that it was. The "even if unreasonable" language therefore was not necessary to decide the issue before the court. See, *e.g.*, *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 67 (1996) (language in an opinion not necessary to the judgment is dicta).

Further, the language about unreasonable good-faith beliefs also was dictum in the case in which it first arose. The court of appeals first used this language in *In re ZiLOG, Inc.*, 450 F.3d 996 (9th Cir. 1996), which addressed whether a debtor's employees could be held in contempt for violating a discharge order when they relied on an email from the debtor's

general counsel and a notice from bankruptcy court suggesting the discharge order did not apply to their claim. *Id.* at 998, 1003-1005. The court reversed and remanded because the bankruptcy court had presumed that the employees knew the discharge order applied to their claims, rather than finding facts on that point. *Id.* at 1007-1010. In a footnote, the court stated that, "[t]o the extent that the deficient notices led the [employees] to believe, even unreasonably, that the discharge injunction did not apply to their claims," they should not be held in contempt. *Id.* at 1009 n.14.

The court of appeals did not assess the reasonableness of the employees' belief; it had "no evidentiary basis on which to dispose of the contempt claim." *Zi-LOG*, 450 F.3d at 1009. Further, the court suggested that the employees' reliance on representations from counsel indicated that their belief was a reasonable one. *Id.* at 1005-1006 (court could "easily see" how the employees would have believed their rights were not implicated by the bankruptcy filing). The "even unreasonably" language thus was a stray passage that had no effect on the decision.

The Ninth Circuit has not repeated the language about unreasonable good-faith beliefs in any other reported decisions. And the court has never confronted a case where a creditor sought to avoid contempt for violating a discharge order because of an unreasonable good-faith belief. Under the circumstances, this Court can and should disapprove that stray language and affirm the judgment. See *Air & Liquid Sys. Corp.* v. *Devries*, No. 17-1104, 2019 WL 1245520, at *6 (Mar. 19, 2019) (Court "d[id] not agree with all of the reasoning of" the court of appeals but nonetheless affirmed its judgment).

B. The Federal Government's Rule Is Substantially The Same And Leads To The Same Result Here

1. The government advocates an objective reasonableness rule that permits consideration of good faith

Like respondents, the federal government begins its analysis with the recognition that the Bankruptcy Code incorporates traditional equitable principles applicable in contempt proceedings. The government's analysis traces a slightly different statutory path, but it arrives at essentially the same place.

a. The government explains that, because a discharge order "operates as an injunction" against the collection of discharged debts, 11 U.S.C. 524(a)(2), the "principles that govern courts' traditional powers to enforce their injunctions" apply in bankruptcy contempt proceedings, U.S. Br. 14. One such principle, the government observes, is that "civil-contempt sanctions may not be imposed if there is an objectively fair ground of doubt that the conduct at issue violated the injunction." *Id.* at 14-15. The government derives that rule from *California Artificial Stone Paving Co.*, *supra*. U.S. Br. 15-16.

The government also relies on decisions of this Court and the courts of appeals recognizing that a court order, including an injunction, must be "clear and unambiguous" to serve as a basis for contempt sanctions. *United States* v. *Saccoccia*, 433 F.3d 19, 27-28 (1st Cir. 2005).[15] And the government notes an im-

---

[15] See U.S. Br. 16-17 (citing *International Longshoremen's Ass'n*, 389 U.S. at 76 (order cannot be "too vague to be understood"); *CFE Racing Prods., Inc.* v. *BMF Wheels, Inc.*, 793 F.3d 571, 598 (6th Cir. 2015) (requiring a "definite and specific order of the

portant corollary to its rule – that courts should "resolve ambiguities [in an order] in favor of the putative contemnor." U.S. Br. 17 (citing cases). These are longstanding equitable principles that appropriately inform the bankruptcy court's exercise of its bankruptcy contempt power. See pp. 21-23, *supra*.

b. Although the government describes its legal standard as one of "objective reasonableness," U.S. Br. 11, the government appears to permit consideration of both good faith and bad faith.

The government recognizes that a bankruptcy court may consider good faith in deciding whether a creditor's position was reasonable. The government first observes that a creditor's "subjective good-faith belief, standing alone, does not preclude a finding of civil contempt." U.S. Br. 23; see *id.* at 21-23. (That is consistent with this Court's decision in *McComb*. See 336 U.S. at 191.) The government then acknowledges that good faith *can* preclude civil contempt when combined with other factors: "[A] defendant's subjective good-faith belief that it is complying with an injunction might sometimes be relevant to the determination whether the belief was objectively reasonable." U.S. Br. 23; see *id.* at 11 (similar).

The government's brief does not elaborate, but it appears to envision a bankruptcy court considering a putative contemnor's good faith in a totality-of-the-circumstances approach to reasonableness. Doing so

---

court" (internal quotation marks omitted)); *Latino Officers Ass'n City of N.Y., Inc.* v. *City of N.Y.*, 558 F.3d 159, 164-165 (2d Cir. 2009) (using both "fair ground of doubt" and "clear and unambiguous" language (internal quotation marks omitted)); *Jove Eng'g, Inc.* v. *IRS*, 92 F.3d 1539, 1546 (11th Cir. 1996) (order must be "clear, definite, and unambiguous" to support contempt)).

would be consistent with traditional equitable principles, as expressed in decisions of this Court. See *Maness*, 419 U.S. at 469; *Watts*, 190 U.S. at 32; see also *Maggio*, 333 U.S. at 76 (court considering contempt "is obliged to weigh * * * all the evidence properly before it in the contempt proceeding in determining whether * * * failure [to comply] constitutes deliberate defiance").

The government also appears to recognize that bad faith can support imposition of contempt sanctions. The government notes that "subjective bad intent is not *required* to support a finding of civil contempt." U.S. Br. 22 (emphasis added). But the government describes *McComb* as involving "bad faith" and notes that bad faith "has traditionally supported civil-contempt sanctions." *Id.* at 26 (citing *Chambers*, 501 U.S. at 50 (upholding civil-contempt sanctions for "bad-faith conduct")). This recognition that bad-faith conduct may be a basis for contempt is consistent with equitable principles and other sanctions regimes. See *Hutto*, 437 U.S. at 689 n.14.

2. Any differences between the government's rule and respondents' rule do not matter here

There appears to be little daylight between respondents' approach and the government's approach, and certainly none that would matter to the outcome in this case.

Respondents' view is that a person should not be held in contempt for violating a discharge order if he has a reasonable, good-faith belief that the order does not apply to his conduct. The government's view is that a person should not be held in contempt for violating a discharge order if there is a "fair ground of doubt" that the order applies to his conduct, and good

faith is relevant to whether a "fair ground of doubt" exists.

The result in this case is the same under either approach. Both rules encompass the principle that a person cannot be held in contempt for violating an order that does not clearly apply to his conduct. And both permit consideration of good faith. Here, it is undisputed that respondents acted in good faith. Pet. App. 13a. And respondents plainly had good reason to believe the discharge order did not apply to their request for attorneys' fees – especially after they obtained a state-court decision in their favor. See *California Artificial Stone Paving Co.*, 113 U.S. at 618 ("If the judges disagree there can be no contempt."). Accordingly, respondents should prevail under either approach.

Perhaps there are situations in which respondents' approach and the government's approach would produce different results. But it is not apparent what those circumstances could be. Respondents and the government agree that bad faith is not required for contempt sanctions, U.S. Br. 22, 26; that subjective good faith by itself is not enough to avoid contempt, *id.* at 22; and that good faith is a relevant factor in deciding whether contempt sanctions are justified, *id.* at 11, 23, 26. The approaches may differ in precisely how they account for good faith: Respondents view good faith as a prerequisite to avoiding contempt sanctions, and the government characterizes good faith as a relevant factor in that analysis. *Id.* at 11, 23. But because everyone agrees respondents acted in good faith here, this case does not present the opportunity to probe this potential difference.

Whether labeled a totality-of-the-circumstances approach to reasonableness, or an objectively reasonable, good-faith belief requirement, the approaches

are substantially the same. And, most important here, respondents cannot be held in contempt of court under either approach.

C. The Court Should Not Adopt Petitioner's Proposed Rule

1. Petitioner proposes a near-strict-liability rule

In petitioner's view, a creditor *must* be held in contempt if the creditor knows of the discharge order and intended the actions that violate it. Pet. Br. 18-19. Under this rule, it does not matter if a creditor acted reasonably and in good faith.

Petitioner borrows his rule from the Eleventh Circuit's decision in *In re Hardy*, 97 F.3d 1384 (1996). Under *Hardy*, a creditor has the requisite knowledge if he is "aware of the discharge injunction." *Id.* at 1390. The creditor need not know that the discharge injunction actually applied to his conduct, only that the debtor "invoked" the discharge injunction. *Ibid.* And the requirement of an "intentional violation" is met so long as the creditor "intended the actions" that violated the order (*i.e.*, he did not take those actions by accident). *Ibid.*; see 22B Charles A. Wright et al., *Federal Practice & Procedure* § 5250 (2d ed. 2018) (lack of intent can be proven through evidence of "mistake, accident, duress, or intoxication").[16]

Petitioner's standard requires imposition of contempt sanctions even for parties acting reasonably

---

[16] Petitioner characterizes his rule as settled law in a majority of circuits and suggests that Congress has acquiesced in that rule. See Pet. Br. 13, 15, 17, 18. That is not correct. The courts of appeals overwhelmingly have recognized that a person cannot be held in contempt when he acts in good faith and has a reasonable basis to believe that a court order does not apply to his conduct. See pp. 21-23 & notes 7, 9, *supra*.

and in good faith. As the government and the courts below recognized, this is a "near-strict-liability standard." U.S. Br. 11; see Pet. App. 36a, 48a, 49a (BAP's characterization of test as "akin to a strict liability test," a "'strict liability' analysis," and "strict liability"); *id.* at 60a (bankruptcy court called petitioner's view a "strict liability" standard). As long as the creditor has some notice of the discharge order (which need not be notice from the bankruptcy court, see Pet. App. 61a), and the creditor acted volitionally, the creditor is branded a contemnor. Even if the creditor has very good reason to believe the discharge order does not apply to his conduct (say, a decision by a court of competent jurisdiction that the order does not apply to him), petitioner would require that the creditor be held in contempt of court.

2. Petitioner's near-strict-liability rule is inconsistent with Section 105 and traditional equitable principles

Petitioner's rule is inconsistent with the Bankruptcy Code and the traditional equitable principles it incorporates.

Section 105(a) provides that bankruptcy courts "may" take steps "necessary or appropriate" to enforce their own orders. 11 U.S.C. 105(a). This provision does not mandate sanctions in any circumstances. Its permissive language stands in stark contrast to the mandatory language of Section 362(k), which requires the court to award actual damages for certain violations of the automatic stay. See 11 U.S.C. 362(k)(1) (person injured by "willful" violation of automatic stay "shall recover actual damages" unless specified good-faith exception applies). When Congress wanted to require a bankruptcy court to impose sanctions, it did so expressly. And when Congress wanted to guide the bankruptcy court's exercise of its contempt authority,

it did that expressly as well. See 26 U.S.C. 7433(e) (authorizing damages against the United States for IRS employees' willful violations of automatic stay or discharge order).

Further, the words "necessary" and "appropriate" reflect the court's equitable discretion and its flexibility to consider the totality of the circumstances before imposing contempt sanctions. *Johnson*, 501 U.S. at 88; see Pet. Br. 18 (petitioner's recognition that the bankruptcy court's Section 105 authority is "exceptionally broad"). The court can therefore consider any reason why contempt sanctions would be inappropriate, such as a creditor's good-faith, reasonable belief that the order did not apply to his conduct. Petitioner's rule would read all of the equitable discretion out of Section 105(a) by precluding bankruptcy courts from taking good faith into account.

Petitioner's rule also is contrary to traditional equitable principles applicable to contempt. It fails to recognize that contempt is a "potent weapon" that should be applied only when a person disobeys a clear court order. *International Longshoremen's Ass'n*, 389 U.S. at 76; see *Maggio*, 333 U.S. at 76 (contempt is for "deliberate defiance"). It is inconsistent with this Court's repeated admonition to "use the least possible power adequate to the end proposed" in contempt sanctions. *Spallone*, 493 U.S. at 276 (internal quotation marks omitted). It ignores the relevance of good faith and bad faith in equitable proceedings like contempt. See *Hutto*, 437 U.S. at 689 n.14 (bad faith); *Maness*, 419 U.S. at 469 (good faith). And it overlooks the well-established principle that a person cannot be held in contempt for violating a court order unless the order clearly applies to his conduct.

Whether articulated as a requirement of no "fair ground of doubt," *California Artificial Stone Paving*

Co., 113 U.S. at 618, or a "clear and unambiguous" order, *Project B.A.S.I.C.*, 947 F.2d at 16, that principle reflects the common-sense view that a person who had good reason to believe that an order does not apply to him does not deserve contempt sanctions. Those sanctions would not serve the purposes of contempt, and they would raise serious concerns about fairness and lack of notice.

3. Petitioner's justifications for his rule are mistaken

Petitioner provides essentially two justifications for his rule, both of which are mistaken.

a. First, petitioner equates automatic-stay violations and discharge-order violations. Br. 20-21. But there are critical differences between the two. Most notably, Congress expressly circumscribed the remedies available for automatic-stay violations but not discharge-order violations: Congress mandated payment of actual damages for certain "willful" violations of the automatic stay, see 11 U.S.C. 362(k)(1) (moving party "shall recover actual damages"), but gave bankruptcy courts discretion to take "necessary or appropriate" action to address discharge-order violations, 11 U.S.C. 105(a). This difference in language underscores that traditional equitable principles apply here. See U.S. Br. 10.

There are good reasons why Congress treated automatic-stay violations differently than discharge order violations. An automatic stay is entered at the outset of the case, and it benefits all interested parties by preserving the property of the estate. The automatic stay applies equally to debtors and creditors; both can be liable for damages under Section 362(k). Congress reasonably decided that courts should strictly enforce the automatic stay. And even in that

context, Congress required proof of a demanding mental state (willfulness) and limited the available damages when a person believed in good faith that a certain exception to the stay applied. See 11 U.S.C. 362(k)(2).[17]

Petitioner contends (Br. 21) that Congress intended to preclude courts from considering good faith in enforcing discharge orders because it included an express good-faith exception in Section 362(k) but not in Section 105(a). But there was no need to do so in Section 105, because that statute makes sanctions discretionary ("may") and gives the court broad and flexible authority ("necessary or appropriate"), which necessarily includes the authority to consider good faith. Such an exception was necessary in Section 362(k), because payment of damages is mandatory ("shall").

b. Petitioner's other justification for his rule is that debtors are in a fragile financial position, and so creditors should have to pay damages if they take any actions that violate discharge orders. Pet. Br. 22-23. Petitioner's argument misunderstands the nature of contempt, and it would upset the balance of interests of debtors and creditors in bankruptcy proceedings.

First, contempt is not a mere cost-allocation rule designed to "restore the status quo ante." Pet. Br. 19.

---

[17] Some courts of appeals have defined "willful," in the context of the automatic-stay provision and the special provision applicable to the IRS, to include merely knowing that the order exists. See, *e.g.*, *IRS* v. *Murphy*, 892 F.3d 29, 35-36 (1st Cir. 2018). That is an unusual definition of "willful." See, *e.g.*, *Black's Law Dictionary* 1834 (10th ed. 2014) ("willful" generally involves "conscious wrong or evil purpose on the part of the actor, or at least inexcusable carelessness"). The Court need not address it here, because this case does not involve an automatic-stay violation or a violation by the IRS.

Rather, it is a sanction on a litigant or lawyer – a "potent weapon" with significant collateral consequences attached. *International Longshoremen's Ass'n*, 389 U.S. at 76. The point of civil contempt is to coerce compliance with a court order, not to improve the financial position of the adverse party. See *Penfield Co. of Cal.* v. *SEC*, 330 U.S. 585, 590 (1948).[18]

Second, there is no thumb on the scales in favor of debtors post-discharge. Of course, many debtors are in dire financial straits when they enter bankruptcy. That is why the Bankruptcy Code affords debtors significant benefits and requires creditors to make significant concessions, including writing off most prepetition debts. 11 U.S.C. 707(b). When the discharge order provides a "fresh start," it clears the slate for both debtors and creditors. *Grogan* v. *Garner*, 498 U.S. 279, 286 (1991). After that fresh start, the normal rules apply, including the rule that each party bears its own costs in litigation. See *Baker Botts L.L.P.* v. *ASARCO LLC*, 135 S. Ct. 2158, 2164 (2015) (American rule for attorneys' fees). Under petitioner's rule, however, a creditor would be forced to bear a debtor's costs long after discharge if the creditor seeks judicial resolution of a discharge order in any forum other than the bankruptcy court and ultimately loses.

Petitioner's near-strict-liability rule would "unduly hinder a creditor's legitimate efforts to collect

---

[18] Petitioner relies (Br. 14) on decisions describing civil contempt as "remedial." But those decisions are distinguishing between civil contempt (which is compensatory) and criminal contempt (which is punitive). See *Shillitani*, 384 U.S. at 369-371; *Gompers*, 221 U.S. at 441; see also U.S. Br. 22. They do not override this Court's understanding of contempt as a "potent weapon" and a "severe remedy" designed for deliberate misconduct. *International Longshoremen's Ass'n*, 389 U.S. at 76; *California Artificial Stone Paving Co.*, 113 U.S. at 618.

non-discharged debts." U.S. Br. 27. Allowing creditors to be held in contempt for good-faith attempts to comply with unclear discharge orders will chill them from attempting to resolve those issues and collect on debts. That would effectively enlarge the scope of the discharge injunction, beyond the many concessions creditors already have made. It also would dissuade attorneys from representing those creditors. Such a rule would upset the "delicate balance" Congress struck when it enacted the Bankruptcy Code. *Midland Funding, LLC* v. *Johnson*, 137 S. Ct. 1407, 1415 (2017).

4. Petitioner's requirement that creditors seek advance determinations is misguided

Apparently recognizing the harshness of his rule, petitioner posits that a creditor can avoid contempt sanctions by seeking judicial guidance before attempting to collect on a debt. Pet. Br. 11, 15, 17, 23 n.12. That is no solution.

a. Petitioner's suggestion is inconsistent with the text of the Bankruptcy Code. The exceptions to discharge in the Code are "self-executing" (U.S. Br. 27); a creditor generally is not required to seek court approval to collect on those debts. Congress set up the system that way so that bankruptcy cases could be resolved quickly and efficiently. See *Katchen* v. *Landy*, 382 U.S. 323, 328 (1966). When Congress wished to require that a creditor resolve a question of dischargeability before attempting to collect on a debt, it said so expressly. 11 U.S.C. 523(c)(1). Petitioner's rule would "effectively override" Congress's determination not to require creditors to adjudicate all claims before attempting to collect on debts, thereby complicating and delaying bankruptcy cases. U.S. Br. 27.

Petitioner's "go to bankruptcy court" rule also is inconsistent with his own policy argument. Petitioner's primary justification for his rule is that debtors should not have to bear the costs of post-discharge litigation. For that reason, he argues the respondents should pay his costs of litigating dischargeability in the state proceeding. But if a creditor follows petitioner's rule and asks the bankruptcy court to decide dischargeability, the debtor would have to bear his own costs (including attorneys' fees) in that proceeding, even if the bankruptcy court ultimately ruled in the debtor's favor. See *Baker Botts L.L.P.*, 135 S. Ct. at 2164 (ordinary rule is no fee-shifting); 11 U.S.C. 523(d) (narrow exception allowing fee-shifting only in certain cases in which the court rejects the creditor's contention that credit was obtained by fraud); see also U.S. Br. 28. Accordingly, petitioner's rule would not have its intended effect of preventing debtors from having to bear any costs associated with litigating dischargeability.

b. Even if an advance determination were required, respondents obtained one here. Petitioner's only response (Br. 22 n.11) is that respondents should have asked the bankruptcy court, not the state court, to resolve the issue. That is incorrect. Although federal courts have exclusive jurisdiction over bankruptcy petitions, 28 U.S.C. 1334(a), state and federal courts have concurrent jurisdiction to determine whether particular debts are dischargeable in bankruptcy, 28 U.S.C. 1334(b). See, *e.g.*, *First State Bank of Roscoe*, 914 F.3d at 1137; *Eden* v. *Robert A. Chapski, Ltd.*, 405 F.3d 582, 586 (7th Cir. 2005); *Whitehouse* v. *LaRoche*, 277 F.3d 568, 576 (1st Cir. 2002); see also U.S. Br. 27. The only exceptions are the instances where the Bankruptcy Code has required advance determinations of dischargeability.

11 U.S.C. 523(a)(2), (4) and (6); *Espinosa*, 559 U.S. at 268-269.[19]

This concurrent jurisdiction serves the interests of judicial economy by allowing state courts to rule on bankruptcy matters that those courts are in a better position to address, either because they raise issues of state law or because they involve matters that have been pending before the state court. See, *e.g.*, *In re Apex Oil Co.*, 406 F.3d 538, 542 (8th Cir. 2005); Fed. R. Civ. P. 8(c)(1) advisory committee's note (2010) (dischargeability may be decided by "the court that entered the discharge" or, more commonly, "another court with jurisdiction over the creditor's claim"). And when state and federal courts have concurrent jurisdiction over a case, the parties cannot be required to pursue their claims in one forum instead of the other. See *Atlantic Coast Line R.R.* v. *Brotherhood of Locomotive Eng'rs*, 398 U.S. 281, 295 (1970).

Here, respondents asked the state court to resolve the dischargeability issue because it arose in the context of the pending state-court case and depended on facts before the state court. Consistent with the established rule of concurrent jurisdiction, petitioner admitted below that the state court could decide that issue. J.A. 94; see Pet. Br. at 14, *Sherwood Park Bus. Ctr.* v. *Taggart*, 341 P.3d 96 (Or. Ct. App. 2012), 2012 WL 7959224. Once the state court resolved that issue

---

[19] When Congress vested state courts with concurrent jurisdiction over discharge questions, it also provided that federal courts may defer to state-court determinations "in the interest of comity with State courts," 28 U.S.C. 1334(c)(1), and required federal courts to defer to state courts in certain circumstances, 28 U.S.C. 1334(c)(2). These amendments reflect Congress's desire to give state courts greater authority to hear bankruptcy-related claims and to show "increased respect for state courts and state laws." S. Rep. No. 55, 98th Cong., 1st Sess. 19 (1983).

in respondents' favor, respondents "were entitled to rely on that decision." Pet. App. 47a.

D. This Court Should Affirm Rather Than Remand

Under either respondents' standard or the government's standard, it is clear that contempt sanctions are inappropriate here. Neither the discharge order nor the Bankruptcy Code resolved whether seeking post-discharge attorneys' fees in the ongoing state litigation would violate petitioner's discharge order. The discharge order was a form order that granted petitioner a discharge but did not specify to which particular debts it applied. J.A. 59-62. The Bankruptcy Code states that the discharge order relieves the debtor from "debts" that arise before the order for relief, 11 U.S.C. 727(b), and defines a "debt" as "liability on a claim," 11 U.S.C. 101(12). But it does not resolve whether a claim to post-discharge attorneys' fees is considered a pre- or post-discharge claim. Circuit precedent allowed a claim for attorneys' fees that was based on the debtor's post-discharge "return to the fray" in ongoing litigation. See *In re Ybarra*, 424 F.3d 1018, 1024 (9th Cir. 2005). That precedent gave respondents a reasonable basis to believe that they could seek attorneys' fees consistent with the discharge order. See Pet. App. 50a-51a (respondents "could not possibly have been aware that the discharge injunction was applicable to their fee request until the *Ybarra* question was adjudicated").

Further, respondents did not simply rely on their own reasonable beliefs about dischargeability. Instead, they acted diligently and in good faith to resolve the open issue about the scope of the discharge order. Pet. App. 47a (respondents "should be praised, not sanctioned" for seeking judicial resolution of the open legal issue). Respondents advised the state court of

the discharge order; advised the court of controlling precedent; and asked the state court to decide whether, under that precedent, respondents could seek attorneys' fees consistent with the discharge order. *Id.* at 13a. The state court resolved the issue in their favor, holding that the discharge order did not bar the attorney's fee award. J.A. 96-99. The bankruptcy court agreed. Pet. App. 33a-34a.

This Court should affirm. None of the relevant facts are disputed. And when this Court's precedents are applied to those undisputed facts, the outcome is clear. All agree that respondents acted in good faith. Pet. App. 13a. Respondents were entitled to rely on the state court's determination in their favor. See *Watts*, 190 U.S. at 32 (attorney could rely on state court's order regarding property in bankruptcy proceedings); *McComb*, 336 U.S. at 192 (suggesting that creditor that sought judicial "clarification" would not be held in contempt). The fact that other courts later disagreed does not undermine the reasonableness of respondents' position and the inappropriateness of contempt. See *California Artificial Stone Paving Co.*, 113 U.S. at 618 ("If the judges disagree there can be no judgment of contempt.").

It would be very instructive for this Court to set out the governing rule and then apply that rule to the facts of this case. Whether contempt is appropriate depends on the totality of the circumstances, see *Maggio*, 333 U.S. at 76, and it would provide the courts of appeals helpful guidance if the Court applies the rule it adopts to the facts of this case. Further, a remand would serve no useful purpose. All a remand would do is increase the costs to the parties and on the judicial system and extend this lengthy dispute, possibly for years into the future. Petitioner's bankruptcy proceedings have been ongoing since 2010, and even

though Brown passed away in 2013, his estate has had to remain open for five and one-half years as a result of this dispute. It is time for this case to end.

Finally, the court of appeals' language about "unreasonable" good-faith beliefs should not prevent this Court from finally resolving the case. See, *e.g.*, *Air & Liquid Sys. Corp.*, 2019 WL 1245520, at *6 (affirming the judgment while disapproving of some of the court of appeals' reasoning). This Court may affirm on any ground permitted by the record, and the Court has had "little hesitation in deciding [a] case" when "the factual record is adequate" and applying the correct standard is "straightforward." *Thigpen* v. *Roberts*, 468 U.S. 27, 32-33 (1984). That is the case here. Respondents did everything right. They do not deserve contempt sanctions.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

JANET M. SCHROER
Hart Wagner, LLP
1000 SW Broadway
Portland, OR 97205

JAMES RAY STREINZ
Streinz Law Office LLC
7830 SW 40th Avenue
Portland, OR 97219

Counsel for Lorenzen

HOLLIS K. MCMILAN
Hollis K. McMilan, P.C.
4504 SW Corbett Avenue
Portland, OR 97239

Counsel for Emmert, Jehnke, and SPBC

NICOLE A. SAHARSKY
Counsel of Record
ANDREW E. TAUBER
MICHAEL B. KIMBERLY
MATTHEW A. WARING
MINH NGUYEN-DANG
Mayer Brown LLP
1999 K Street NW
Washington, DC 20006
(202) 263-3000

AARON GAVANT
Mayer Brown LLP
71 S. Wacker Dr.
Chicago, IL 60606

Counsel for all Respondents

MARCH 2019

APPENDIX

APPENDIX

1. 11 U.S.C. 105 provides:

Power of Court

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

(b) Notwithstanding subsection (a) of this section, a court may not appoint a receiver in a case under this title.

(c) The ability of any district judge or other officer or employee of a district court to exercise any of the authority or responsibilities conferred upon the court under this title shall be determined by reference to the provisions relating to such judge, officer, or employee set forth in title 28. This subsection shall not be interpreted to exclude bankruptcy judges and other officers or employees appointed pursuant to chapter 6 of title 28 from its operation.

(d) The court, on its own motion or on the request of a party in interest –

(1) shall hold such status conferences as are necessary to further the expeditious and economical resolution of the case; and

(2) unless inconsistent with another provision of this title or with applicable Federal Rules of Bankruptcy Procedure, may issue an order at any such conference prescribing such limitations and

conditions as the court deems appropriate to ensure that the case is handled expeditiously and economically, including an order that –

(A) sets the date by which the trustee must assume or reject an executory contract or unexpired lease; or

(B) in a case under chapter 11 of this title –

(i) sets a date by which the debtor, or trustee if one has been appointed, shall file a disclosure statement and plan;

(ii) sets a date by which the debtor, or trustee if one has been appointed, shall solicit acceptances of a plan;

(iii) sets the date by which a party in interest other than a debtor may file a plan;

(iv) sets a date by which a proponent of a plan, other than the debtor, shall solicit acceptances of such plan;

(v) fixes the scope and format of the notice to be provided regarding the hearing on approval of the disclosure statement; or

(vi) provides that the hearing on approval of the disclosure statement may be combined with the hearing on confirmation of the plan.

2. 11 U.S.C. 362 provides, in pertinent part:

Automatic stay

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3)

of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of –

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court con-

cerning a tax liability of a debtor that is a corporation for a taxable period the bankruptcy court may determine or concerning the tax liability of a debtor who is an individual for a taxable period ending before the date of the order for relief under this title.

* * *

(k)(1) Except as provided in paragraph (2), an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

(2) If such violation is based on an action taken by an entity in the good faith belief that subsection (h) applies to the debtor, the recovery under paragraph (1) of this subsection against such entity shall be limited to actual damages.

3. 11 U.S.C. 524 provides, in pertinent part:

Effect of discharge

(a) A discharge in a case under this title –

(1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section 727, 944, 1141, 1228, or 1328 of this title, whether or not discharge of such debt is waived;

(2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived; and

(3) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect or recover from, or offset against, property of the debtor of the kind specified in section 541(a)(2) of this title that is acquired after the commencement of the case, on account of any allowable community claim, except a community claim that is excepted from discharge under section 523, 1228(a)(1), or 1328(a)(1), or that would be so excepted, determined in accordance with the provisions of sections 523(c) and 523(d) of this title, in a case concerning the debtor's spouse commenced on the date of the filing of the petition in the case concerning the debtor, whether or not discharge of the debt based on such community claim is waived.

4. 26 U.S.C. 7433 provides:

Civil damages for certain unauthorized collection actions

(a) In general

If, in connection with any collection of Federal tax with respect to a taxpayer, any officer or employee of the Internal Revenue Service recklessly or intentionally, or by reason of negligence, disregards any provision of this title, or any regulation promulgated under this title, such taxpayer may bring a civil action for damages against the United States in a district court of the United States. Except as provided in section 7432, such civil action shall be the exclusive remedy for recovering damages resulting from such actions.

(b) Damages

In any action brought under subsection (a) or petition filed under subsection (e), upon a finding of liability on the part of the defendant, the defendant shall be liable to the plaintiff in an amount equal to the lesser of $1,000,000 ($100,000, in the case of negligence) or the sum of –

(1) actual, direct economic damages sustained by the plaintiff as a proximate result of the reckless or intentional or negligent actions of the officer or employee, and

(2) the costs of the action.

(c) Payment authority

Claims pursuant to this section shall be payable out of funds appropriated under section 1304 of title 31, United States Code.

(d) Limitations

(1) Requirement that administrative remedies be exhausted

A judgment for damages shall not be awarded under subsection (b) unless the court determines that the plaintiff has exhausted the administrative remedies available to such plaintiff within the Internal Revenue Service.

(2) Mitigation of damages

The amount of damages awarded under subsection (b)(1) shall be reduced by the amount of such damages which could have reasonably been mitigated by the plaintiff.

(3) Period for bringing action

Notwithstanding any other provision of law, an action to enforce liability created under this section may be brought without regard to the amount in controversy and may be brought only within 2 years after the date the right of action accrues.

(e) Actions for violations of certain bankruptcy procedures

(1) In general

If, in connection with any collection of Federal tax with respect to a taxpayer, any officer or employee of the Internal Revenue Service willfully violates any provision of section 362 (relating to automatic stay) or 524 (relating to effect of discharge) of title 11, United States Code (or any successor provision), or any regulation promulgated under such provision, such taxpayer may petition the bankruptcy court to recover damages against the United States.

(2) Remedy to be exclusive

(A) In general

Except as provided in subparagraph (B), notwithstanding section 105 of such title 11, such petition shall be the exclusive remedy for recovering damages resulting from such actions.

(B) Certain other actions permitted

Subparagraph (A) shall not apply to an action under section 362(h) of such title 11 for a violation of a stay provided by section 362 of such title; except that –

(i) administrative and litigation costs in connection with such an action may only be awarded under section 7430; and

(ii) administrative costs may be awarded only if incurred on or after the date that the bankruptcy petition is filed.

5. 28 U.S.C. 1334 provides:

Bankruptcy cases and proceedings

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Except as provided in subsection (e)(2), and notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

(c)(1) Except with respect to a case under chapter 15 of title 11, nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the

district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

(d) Any decision to abstain or not to abstain made under subsection (c) (other than a decision not to abstain in a proceeding described in subsection (c)(2)) is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title. Subsection (c) and this subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

(e) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction –

(1) of all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate; and

(2) over all claims or causes of action that involve construction of section 327 of title 11, United States Code, or rules relating to disclosure requirements under section 327.

No. 18-489

In the Supreme Court of the United States

BRADLEY WESTON TAGGART, PETITIONER

v.

SHELLEY A. LORENZEN, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

JOHN M. BERMAN
7175 SW Beveland St., Ste. 210
Tigard, OR 97223

DANIEL L. GEYSER
Counsel of Record
GEYSER P.C.
One Energy Square
4925 Greenville Ave., Ste. 200
Dallas, TX 75206
(214) 800-2660
daniel.geyser@geyserpc.com

TABLE OF CONTENTS

Page

Introduction 1

Argument 2

A. All sides now agree that the Ninth Circuit applied the wrong legal standard 2

B. The government's and respondents' proposed standards are incompatible with traditional contempt principles and the Bankruptcy Code 4

1. The new proposed standards are at odds with traditional contempt authority 6

2. The new proposed standards are at odds with the courts' statutory remedial authority under the Bankruptcy Code 13

C. Even if a reasonableness standard applies, respondents' conduct was patently unreasonable 17

Conclusion 20

TABLE OF AUTHORITIES

Cases:

California Artificial Stone Paving Co. v. *Molitor*, 113 U.S. 609 (1885) 9

Castellino Villas, A.K.F. LLC, In re, 836 F.3d 1028 (9th Cir. 2016) 18

Grogan v. *Garner*, 498 U.S. 279 (1991) 10

Hardy, In re, 97 F.3d 1384 (11th Cir. 1996) 13

International Longshoremen's Ass'n, Local 1291 v. *Philadelphia Marine Trade Ass'n*, 389 U.S. 64 (1967) 11

IRS v. *Murphy*, 892 F.3d 29 (1st Cir. 2018) 12

Page

Cases—continued:

Law v. *Siegel*, 571 U.S. 415 (2014) 11
McComb v. *Jacksonville Paper Co.*,
336 U.S. 187 (1949) ..... *passim*
NBA Props., Inc. v. *Gold*, 895 F.2d 30
(1st Cir. 1990) 11
Roadway Express, Inc. v. *Piper*,
447 U.S. 752 (1980) 11
Robin Woods, Inc. v. *Woods*, 28 F.3d 396
(3d Cir. 1994) 7
Schmidt v. *Lessard*, 414 U.S. 473 (1974) 10
TiVo Inc. v. *EchoStar Corp.*, 646 F.3d 869
(Fed. Cir. 2011) 12
Whitehouse v. *LaRoche*, 277 F.3d 568 (1st Cir. 2002) ... 10
Wiggins v. *Smith*, 539 U.S. 510 (2003) 20
Xitronix v. *KLA-Tencor Corp.*,
916 F.3d 429 (5th Cir. 2019) 20
Ybarra, In re, 424 F.3d 1018 (9th Cir. 2015) 17, 18

Statutes and rules:

Bankruptcy Code, 11 U.S.C. 101-1532 ..... *passim*
11 U.S.C. 105(a) ..... *passim*
11 U.S.C. 362(k) 14
11 U.S.C. 362(k)(2) 14
11 U.S.C. 523 ..... 10, 11, 14
11 U.S.C. 523(a)(2) 14
11 U.S.C. 524 ..... 10, 11, 14, 16
26 U.S.C. 7433 14
Fed. R. Bankr. P. 4007 ..... *passim*
Or. R. Civ. P. 68(C)(4)(d)(ii) 16

In the Supreme Court of the United States

No. 18-489

BRADLEY WESTON TAGGART, PETITIONER

v.

SHELLEY A. LORENZEN, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

INTRODUCTION

The question initially presented in this case was the narrow issue whether a creditor's "good faith belief" is sufficient to excuse a discharge violation, "even if the creditor's belief is unreasonable." All sides now agree that the Ninth Circuit's "good faith" standard is incorrect. That alone is sufficient to reverse the Ninth Circuit, which departed from the overwhelming national rule applied in other jurisdictions for decades. In those courts, unlike the Ninth Circuit, a creditor who violates the discharge is subject to a statutory remedial order under Section 105, and the creditor's reasons or motivations for violating the injunction are irrelevant.

Rather than follow this clear authority, however, respondents and the government now propose a novel rule for the bankruptcy setting. According to their theory, a

creditor who actually violates the discharge is categorically immune from liability if the creditor had a "fair" or "reasonable" basis for its action.

This proposed rule is likewise wrong. A discharge violation imposes reals costs on other parties, and the creditor's subjective or objective beliefs do not make those costs disappear. The question thus becomes who is going to bear the consequences of violating the discharge: the creditor who committed the violation, or the debtor who is protected by the Code's decree from precisely this kind of conduct.

The answer is clear from this Court's traditional contempt authority, and a straightforward application of the Code. Section 105 creates broad discretionary authority for bankruptcy judges to remedy discharge violations, and the bankruptcy laws set out a specific, inexpensive, efficient procedure for creditors to obtain guidance on their rights where there is legitimate confusion about the discharge's scope. A creditor who is aware of the discharge and plows ahead anyway—refusing to seek a ruling before impairing the debtor's fresh start—is subject to remedial relief under Section 105. The government and respondents' contrary position would upset decades of settled practice, frustrate the Code's proper administration, and eliminate the Code's primary tool for protecting debtors from serious abuse.

The decision below should be reversed.

ARGUMENT

A. All Sides Now Agree That The Ninth Circuit Applied The Wrong Legal Standard

1. In the decision below, the Ninth Circuit held that a "creditor's good faith belief that the discharge injunction does not apply * * * precludes a finding of contempt, even if the creditor's belief is unreasonable." Pet. App. 12a; see

also *id.* at 13a ("Although the Creditors * * * were ultimately incorrect, their good faith belief, even if unreasonable, insulated them from a finding of contempt."). As petitioner explained (Pet. Br. 13-25), that holding was directly at odds with this Court's longstanding rules for general civil contempt and a proper application of the Bankruptcy Code. There was no analytical support for the Ninth Circuit's position, and a "good faith" rule would eviscerate the debtor's "fresh start" and frustrate the bankruptcy system.

All sides to this case now agree that the Ninth Circuit's rule is wrong. Although respondents resisted this conclusion below, they now concede that good faith alone cannot immunize a creditor from contempt. Resp. Br. 31-33; see also, *e.g.*, *id.* at 35 (admitting the Ninth Circuit's decision is "[in]consistent" with *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187 (1949)). And the government likewise has confirmed that a subjective-intent standard has no legal foundation in the bankruptcy context. See, *e.g.*, U.S. Br. 22 ("The court of appeals erred in treating subjective bad faith as a prerequisite to contempt remedies.").

The Ninth Circuit did not try to justify the merits of its position at any point in its opinion; it simply identified its "good faith" rule in an earlier circuit decision, and declared itself "b[ound]" going forward. Pet. App. 13a. Its holding was indefensible below, and it is now undefended in this Court. Because the decision below was premised on an incorrect legal standard, reversal is plainly warranted.

2. While admitting the Ninth Circuit's operative rationale was wrong, respondents nonetheless attempt to avoid a quick reversal. They first insist that the Ninth Circuit's holding—declaring a party's subjective intent dispositive—was merely "dictum." Resp. Br. 31. This is baseless. The Ninth Circuit did not announce its holding in "stray language" (contra Resp. Br. 33); it unequivocally

stated its holding multiple times in the opinion (Pet. App. 12a-14a), and the court plainly meant what it said. The government understood the holding the same way (U.S. Br. 29); lower courts and commentators have understood the holding the same way (NACBA Amicus Br. 8-14; Pet. 3 n.1); and even *respondents themselves* previously understood the holding the same way (Br. in Opp. 2). Respondents may now prefer to defend an "objective reasonableness" standard, but they cannot simply rewrite the Ninth Circuit's decision.

As a second attempt, respondents also declare that the Ninth Circuit assessed the "objective basis" for their beliefs, and "[n]o one in this case ever suggested that respondents' belief" was "unreasonable." Br. 32. This is again false. Putting aside for now that (i) respondents' proposed standard is wrong; and (ii) respondents' cannot satisfy their own (wrong) standard on these facts (see *infra*), the Ninth Circuit nowhere found that respondents had a "reasonable" basis for their conduct. It solely noted that respondents acted in "good faith," and stressed, repeatedly, that this "good faith belief, *even if unreasonable*, insulated them from a finding of contempt." Pet. App. 13a (emphasis added). The Ninth Circuit had every opportunity to explain why respondents' discharge violation was somehow objectively reasonable, but it instead brushed aside that factor in light of the categorical weight it assigned to "good faith." Respondents cannot manufacture new findings out of thin air—and if a court ever does apply respondents' novel standard, respondents will flunk the test.

B. The Government's And Respondents' Proposed Standards Are Incompatible With Traditional Contempt Principles And The Bankruptcy Code

Both the government and respondents admit that the Ninth Circuit erred in adopting a per se rule that "good

faith" automatically forecloses any remedial relief for actual discharge violations. But the government and respondents now each commit a new error in replacing one per se rule with another. According to the government, Section 105 remedial orders are off-limits any time there is a "fair ground" to doubt the discharge applies. And according to respondents, a creditor's "objectively reasonable" belief is sufficient to categorically insulate the creditor from liability.[1]

Both standards are wrong. Under this Court's settled decisions, remedial contempt is appropriate to secure the benefits of a decree; here, the discharge strictly prohibits the collection of discharged debts, and its protections are not contingent on the *reason* a party violates the discharge. Likewise, the Code independently authorizes statutory remedial relief whenever the discharge injunction is violated. Congress granted bankruptcy courts broad discretion under Section 105 to enter any order "necessary" or "appropriate" to enforce the Code's provisions. There is absolutely nothing in this Court's authority

---

[1] The government and respondents suggest that subjective intent plays some role in the analysis, but their theories are incoherent. The government obliquely suggests that a creditor's good faith might somehow cast light on the "fair[ness]" of its views. U.S. Br. 23-24; see also Resp. Br. 35 ("[t]he government's brief does not elaborate"). But objective and subjective standards are analytically distinct. The fact that one creditor ardently (*but wholly unreasonably*) thinks it can escape the discharge does not make its views any "fairer"; at the very most, it would represent a single data point about how *one person* views the situation—which is "fair" only to the extent that person holds *fair views*. And respondents say that creditors must establish *both* good faith and objective reasonableness to foreclose liability; "good faith" thus matters under their view only to the extent a creditor takes a "reasonable" position *in bad faith*. Resp. Br. 37. In other words, while bad faith may itself expose a creditor to liability, good faith alone is irrelevant. Because good faith is not disputed here, this aspect of respondents' proposal is irrelevant to the case's disposition.

or the Code itself that eliminates the court's discretion whenever a creditor has some explanation for *actually violating the law*. Each violation imposes real costs that someone must ultimately incur; there is no basis for shifting those costs to the innocent party.

While the usual exercise of discretion under Section 105 will lead to full remedial relief, bankruptcy courts do retain discretion to take into account the totality of the circumstances, including any reasonable basis for the creditor's actions. That means that while a discharge violation always exposes a creditor to liability, the court "may" calibrate the level of relief as appropriate under the circumstances. 11 U.S.C. 105(a). That discretion itself is an important protection for creditors who take every precaution short of abandoning their claim. But there is no per se rule that inocula[illegible] the creditor *as a matter of law* any time it can identify some "fair" (but *incorrect*) basis for insisting its conduct fell outside the discharge.

1. The New Proposed Standards Are At Odds With Traditional Contempt Authority

a. The government and respondents have no real answer for *McComb*. As petitioner explained (Br. 13-16), *McComb*'s rationale was clear—a decree exists for the benefit of the protected class, and the party's reasons for violating that decree are irrelevant:

> Since the purpose is remedial, it matters not with what intent the defendant did the prohibited act. The decree was not fashioned so as to grant or withhold its benefits dependent on the state of mind of respondents. It laid on them a duty to obey specified provisions of the statute. An act does not cease to be a violation of a law and of a decree merely because it may have been done innocently.

336 U.S. at 191.

The government agrees that, "'[s]ince the purpose [of civil contempt] is remedial, it matters not with what intent the defendant did the prohibited act.'" U.S. Br. 11 (quoting *McComb*, 336 U.S. at 191). But the government makes no attempt to square that rationale with its proposed rule. The "remedial" purpose is unfulfilled whether the prohibited act was done "reasonably" or not. The fact remains that the act was unlawful and the creditor violated the protected class's rights. *McComb* declared that sufficient to activate "the power of a court to grant the relief that is necessary to effect compliance with its decree." 336 U.S. at 193; see also, *e.g.*, *Robin Woods, Inc.* v. *Woods*, 28 F.3d 396, 400 (3d Cir. 1994) ("[c]ompensatory awards seek to ensure that the innocent party receives the benefit of the injunction"; they "'make reparation to the injured party and restore the parties to the position they would have held had the injunction been obeyed").[2]

The government also suggests that the decree in *McComb* was clear, eliminating any possible "fair" ground for the violator's conduct. This is pure fiction. *McComb* specifically talked about "uncertainty in the decree" (336 U.S. at 193); both lower courts *rejected* contempt because "neither the law nor the injunction specifically referred to or condemned the practices which were found to violate the Act" (*id.* at 190-191); and the dissent confirmed the view that "the practices" were not on "any fair consideration" covered by the injunction (*id.* at 196 (Frankfurter, J., dissenting)).[3]

---

[2] This "power" is an exact parallel to the bankruptcy court's power under Section 105 to order any relief "necessary" or "appropriate" to effect compliance with the Code. 11 U.S.C. 105(a).

[3] Indeed, the district court ultimately construed the contempt request as "an amended complaint seeking a *broadening* of the previous decree" in order to capture the challenged conduct. 336 U.S. at 190

Yet *McComb* still found that a remedial award was appropriate: the parties "undertook to make their own determination of what the decree meant. They knew they acted at their peril." 336 U.S. at 192. And because "the aim is remedial and not punitive, there can be no complaint that the burden of any uncertainty in the decree is on respondent's shoulders." 336 U.S. at 192, 193.

These principles contradict the government's and respondents' proposed standards. The discharge secures the debtor's fresh start, and that benefit is impaired irrespective of the creditor's rationale for violating the law. Creditors have every right to seek clarification or guidance on the discharge's scope; and, indeed, the bankruptcy rules provide a specific, inexpensive, efficient procedure designed precisely for that purpose. Fed. R. Bankr. P. 4007; see also *McComb*, 336 U.S. at 192 (noting the violator's ability to seek a "modification, clarification or construction of the order"). A creditor who is put on notice of the discharge and elects to plow ahead anyway—in the face of a "reasonable" basis for knowing the discharge *applies*—assumes the risk of guessing wrong.

b. In attempting to sidestep *McComb*, the government and respondents trot out a series of cases involving traditional contempt power outside the bankruptcy context. These cases address different issues, do not undermine *McComb* (unsurprisingly), and have nothing to do with the bankruptcy court's statutory remedial authority under Section 105.

First, according to the government and respondents, this Court articulated the "fair ground" standard in *California Artificial Stone Paving Co.* v. *Molitor*, 113 U.S.

(emphasis added); see also *id.* at 197 (Frankfurter, J., dissenting) (noting "the conclusion of the two lower courts that there was no contempt because there was no disobedience of the injunction").

609 (1885). As they read that decision, this Court held that (i) remedial contempt is strictly prohibited whenever "there is a fair ground of doubt" that the injunction applies, and (ii) "if the judges disagree there can be no judgment of contempt." 113 U.S. at 618.

The government and respondents have badly misread this decision. First and foremost, they overlook the apparent reason that contempt was unavailable "if the judges disagree"—*the case arose from a 1-1 vote on a two-judge panel*. See 113 U.S. at 615. In other words, a *tie vote* cannot lead to contempt. The Court did not say that any judicial disagreement foreclosed contempt, and such a holding would be strictly at odds with *McComb*—where, again, the lower courts (and a two-Justice dissent) disagreed with the ultimate conclusion.

Nor did the Court say that a "fair ground" *precluded* contempt. Quite the contrary, the Court expressly noted that the complainant could "seek review of that decision in this court, or bring a new suit against the defendant." 113 U.S. at 618. The Court did not say that appeal would be futile because of the violator's "fair" position or the "disagree[ment]" below; it specifically confirmed further review as an open option. And rather than categorically foreclosing anything, the Court simply noted what "should" happen, not what *must*: a new suit "is by far the most appropriate [method] where [the violation] is really a doubtful question." *Ibid.* The Court thus assuredly did *not* hold that a "fair ground of doubt" is an absolute bar to remedial relief; it merely explained that where, as in that case, a judge-crafted injunction enjoined certain conduct, reasonable disputes about the parties' rights are better resolved in a new case. Any contrary reading would set up a direct conflict with *McComb* itself.

Second, while courts do insist that *judge-made* injunctions be sufficiently definite and precise, those concerns

are a poor fit for the *statutory* injunction in the Code. No one thinks the Code is "too vague to be understood." *Schmidt* v. *Lessard*, 414 U.S. 473, 476 (1974) (per curiam). Congress made the determination about the level of specificity required to put creditors on notice of the discharge's terms, and Congress specifically declared that the discharge (*as framed*) "operates as an injunction." 11 U.S.C. 524(a)(2). It is inconceivable that Congress intended discharge violations to be set aside whenever any party could conjure up some "fair" ground to say a discharged debt fell outside the Code. And that is especially true given what Congress did *not* include in Section 524: there is no textual hook for recognizing a "good faith" or "fair ground" defense to the discharge—Congress prohibited *all* attempts to collect discharged debts, not just "unreasonable" attempts.[4]

Respondents make much ado about the discharge order itself, highlighting its terseness and lack of specificity. But this misunderstands the way bankruptcy works. The discharge order is ultimately premised *on the Code*; the details are supplied by Sections 523 and 524, and the debts are listed directly on the debtor's bankruptcy schedules. The relevant available detail is thus robust. And respondents further overlook that exceptions to the discharge are indeed *exceptions*, not the rule; those exceptions are construed narrowly, and creditors should be well aware that any debt that plausibly falls within the Code's terms is likely to fall within the discharge. See, *e.g.*, *Grogan* v. *Garner*, 498 U.S. 279, 286-287 (1991); *Whitehouse*, 277 F.3d at

---

[4] And the logic of the bankruptcy laws is apparent: Instead of excusing creditors for violating the Code in good faith (or with a "fair" argument), the scheme permits creditors to invoke the inexpensive, efficient procedure under Rule 4007 to obtain guidance and *avoid* violations in the first place. See, *e.g.*, *Whitehouse* v. *LaRoche*, 277 F.3d 568, 576 (1st Cir. 2002).

575. Any remaining doubts about the discharge's scope are still available for determination under Rule 4007, which, again, is designed precisely for that purpose.

Third, the true dangers of inherent authority are not present in this context. "Because inherent powers are shielded from direct democratic controls, they must be exercised with restraint and discretion." *Roadway Express, Inc.* v. *Piper*, 447 U.S. 752, 764 (1980). But judicial authority here is exercised pursuant to Congress's express authority under Section 105, and construed to "carry out" the precise legislative commands in the Code. See *Law* v. *Siegel*, 571 U.S. 415, 420-421 (2014). This vastly diminishes any dangers of judicial overreaching; it does not present the same risks or concerns as judge-crafted injunctions setting out substantive legal boundaries on an ad-hoc basis.[5]

Finally, the government and respondents misstate the ultimate effect of the vast majority of their authority. These cases respond to the concerns and dangers of judge-made injunctions by construing the injunction *not* to apply—so there is no violation in the first place. See, *e.g.*, *NBA Props., Inc.* v. *Gold*, 895 F.2d 30, 32-34 (1st Cir. 1990) (Breyer, J.). These cases did not say that the decree *does* apply but the actual violation is excused.

This logic does not carry over in this setting. The Code means whatever it means. The issue is always binary: either the discharge was violated or it was not. There is no room for construing "ambiguities" in the Code to mean

---

[5] The government and respondents also invoke decisions striking down certain injunctions as being effectively "unintelligible." See, *e.g.*, *International Longshoremen's Ass'n, Local 1291* v. *Philadelphia Marine Trade Ass'n*, 389 U.S. 64, 76 (1967). No one, again, believes that the Code is invalid or impermissibly vague. The specific statutory commands in Section 523 and Section 524 put parties on fair notice that they might fall under the ambit of the discharge.

different things in different cases. If a creditor actually violates the Code, their intent or motivation is irrelevant; the creditor is subject to "pay[ing] the damages caused by their violations of the decree." *McComb*, 336 U.S. at 193.

These principles are perhaps best illustrated by one of the government's and respondents' own cases—*TiVo Inc.* v. *EchoStar Corp.*, 646 F.3d 869 (Fed. Cir. 2011) (en banc). In *TiVo*, the Federal Circuit rejected the exact argument the other side is pressing here: that "contempt is improper where the defendant engaged in diligent, good faith efforts to comply with the injunction and had an objectively reasonable basis to believe that it was in compliance." 646 F.3d at 880 (internal quotation marks omitted). The court declared flatly that "EchoStar misreads the law": "We have made it clear that, under Supreme Court precedent, a lack of intent to violate an injunction alone cannot save an infringer from a finding of contempt." *Ibid.* (also quoting *McComb*). "[W]here a party faced with an injunction perceives an ambiguity in the injunction, it cannot unilaterally decide to proceed in the face of the injunction and make an after-the-fact contention that it is unduly vague." *Id.* at 885.

In sum, the government and respondents attempt to make up in quantity what they lack in authority. But they fail to cite any relevant precedent in the bankruptcy context—indeed, it appears that they could not cite *any* authority holding that Section 105 remedial orders are flatly prohibited whenever a creditor can imagine up some "fair" or "reasonable" explanation for its conduct. Petitioner, by contrast, relies on the majority rule followed by jurisdictions nationwide: If a creditor is aware of the bankruptcy and actually violates the discharge, the creditor is subject to potential liability under Section 105. See, *e.g.*, *IRS* v. *Murphy*, 892 F.3d 29, 38-39 (1st Cir. 2018);

Pet. 11-21 (outlining authority in multiple circuits, two bankruptcy appellate panels, and multiple district courts).

2. The New Proposed Standards Are At Odds With The Courts' Statutory Remedial Authority Under The Bankruptcy Code

As petitioner already established, Section 105 provides clear statutory authority to redress discharge violations and restore the status quo. This follows directly from Code's text, context, purpose, and history, and neither the government nor respondents have remotely established that this authority disappears whenever a creditor offers a "reasonable" basis for violating the discharge.[6]

a. In lodging many of their objections, the government and respondents overlook a key feature of Section 105: it provides *discretionary* authority to award relief. While the exercise of discretion will usually require the provision of "full remedial relief" (*McComb*, 336 U.S. at 193), courts do have the power to consider all the circumstances underlying a violation. That consideration can include deciding to focus the contempt order on the creditor, not the creditor's attorney, and adjusting the remedial amount to reflect the comparative equities of the parties.

This broad, equitable discretion is flatly inconsistent with the categorical prohibitions proposed by the govern-

---

[6] Although courts typically use the "contempt" label in describing relief under Section 105, the use of the word "contempt" is somewhat out of place. These orders are statutory remedial orders. See, *e.g.*, *In re Hardy*, 97 F.3d 1384, 1391 (11th Cir. 1996). The Code does not use the word "contempt" anywhere in Section 105, and the function is not to punish or shame creditors; the entire purpose is to carry out the Code by enforcing and restoring the discharge injunction. The power flows from that directive, and this Court could provide useful guidance to lower courts by clarifying the proper nature of the remedial award.

ment and respondents. There is nothing in the text of Section 105 or Sections 523 and 524 that suggests that a creditor's "reasonableness" is grounds for automatically foreclosing a remedial order under Section 105. Congress knows how to draft such preconditions where it so wishes (see, *e.g.*, 11 U.S.C. 362(k)(2)), and yet it barred "all" efforts to collect discharged debts, and authorized courts to issue "any" order necessary to carry out the Code. The bright-line proposals have no grounding in the text.

b. The bankruptcy law's scheme is also readily apparent. As noted earlier, the rules provide an express mechanism exclusively for obtaining dischargeability rulings. Fed. R. Bankr. P. 4007. In response, the government and respondents argue that the Code only requires "advance determinations" in certain situations (*e.g.*, 11 U.S.C. 523(a)(2)), and pointing creditors to Rule 4007 is inconsistent with those mandatory provisions.

This is baseless. No one is saying that creditors are *required* to use Rule 4007. The entire point is that the Code provides the *option* of seeking review for those creditors who worry about the consequences of collecting a discharged debt. This inexpensive, streamlined provision accommodates the interests of both debtors and creditors, and it eliminates the excuse of those creditors who are aware of potential problems with the discharge and yet decide to collect anyway.[7]

---

[7] Petitioner has already explained how Congress's refusal to adopt a "good faith" or "reasonableness" standard under Section 362(k) or 26 U.S.C. 7433 suggests that courts operating under Section 105 should follow the same lead. Aside from (sheepishly) suggesting that Section 362(k) excuses damages for good-faith conduct, respondents argue that there are reasons to differentiate between stay violations and discharge violations. This is wrong. Courts have always applied

c. The government and respondents are likewise wrong that pointing to Rule 4007 creates an anomaly: petitioner admits that the debtor would be required to cover the costs of litigating a Rule 4007 proceeding, but is permitted to seek remedial relief for litigating discharge issues in the context of a state-court collection suit.

There is no anomaly at all. These two types of proceedings—an affirmative action to collect a debt and a declaratory action seeking guidance under Rule 4007—are different in degree and kind. The scope of the proceedings are vastly different: a debtor is forced to litigate *all* the issues in a state-court collection action; a Rule 4007 proceeding is focused exclusively on the single discharge issue. Moreover, the Rule 4007 proceeding is designed to provide quick, inexpensive, and efficient answers to discharge questions; it has the advantage of an expert bankruptcy judge who is familiar with the issues, unlike a state court where procedures may be more cumbersome (and the judge may be less familiar with the questions).

And, critically, it also has the advantage of keeping the burden on the creditor, not the debtor. A debtor can always decide to rely on the bankruptcy judge to resolve the discharge issue, even without the debtor's participation. (The judge, after all, will not declare the debt beyond the discharge without making an actual finding that the debt is beyond the discharge.) In a state court, by contrast, the debtor is forced to affirmatively litigate at the risk of giving up his or her rights.

Aside from these practical differences, there is also an important legal difference: A request for declaratory relief under Rule 4007 does not violate any provision of the

---

the same standards to each under Section 105 (for conduct falling outside Section 362(k) (see, *e.g.* Pet. Br. 21); and Congress expressly treated the violations the same under 26 U.S.C. 7433.

discharge; an affirmative petition to collect discharged debts, by contrast, falls squarely within the heartland of banned conduct (11 U.S.C. 524(a)(2))—precisely the type of activity that upsets the debtor's fresh start, imposes unnecessary costs on a debtor who has emerged from bankruptcy, and creates the risk that the debtor will be coerced into paying a debt that was properly excused in the bankruptcy case.

Neither the government nor respondents have any answer to these obvious considerations.[8]

d. Finally, respondents and the government suggest that a potential remedial award for a "reasonable" violation upsets the proper balance between creditors and debtors. This is perplexing. For one, it ignores the obvious impairment of the Code. This sets up a clear "heads I win, tails you lose" scenario: A creditor can simply try to collect without any real fear of paying the consequences for the costs it imposes on others. If the debtor gives up and pays, the creditor might collect a discharged debt; if the debtor fights, the creditor will know it is safe so long as it has a "fair" ground for its position. This is not a recipe for a fair or effective bankruptcy regime.[9]

Any creditor interested in pursuing its rights can do so directly (assuming the creditor is not concerned about

---

[8] Respondents suggest they had no choice but to proceed in state court before their fee motion was due within 14 days of the judgment. This overlooks that Oregon law, like the law in virtually all States, grants trial courts discretion to adjust the deadlines on any terms "that may be just." Or. R. Civ. P. 68(C)(4)(d)(ii).

[9] Debtors typically cannot afford to hire attorneys to fight discharge violations; if remedial orders are unavailable under Section 105, debtors will generally be left fighting off creditors on their own—or, more realistically, simply giving up the fresh start by acquiescing in the collection attempt.

the possibility of covering the costs of a violation). And any creditor concerned about potential remedial orders can seek an inexpensive determination under Rule 4007. There is no reason that any creditor with any legitimate claim will forgo collection.[10]

And while respondents suggest the sky will fall unless creditors are free to pursue marginal theories over discharged debts, experience again suggests otherwise. Respondents ignore that petitioner's "rule" is not new. Unlike respondents and the government, petitioner suggests the Court retain the same status quo that has existed in countless jurisdictions for decades, apparently without any concrete effect on the ability of creditors to collect legitimate debts. There is no reason to upset the status quo now.

C. Even If A Reasonableness Standard Applies, Respondents' Conduct Was Patently Unreasonable

If this Court does adopt a "reasonableness" standard, respondents' conduct was patently unreasonable. While such a question is better suited for disposition in the first instance on remand, suffice it to say that respondents' aggressive, misleading take merely highlights the problems debtors face with litigious creditors who refuse to respect the discharge.

1. As an initial matter, respondents' legal theory is unsupportable. Putting aside that *In re Ybarra*, 424 F.3d 1018 (9th Cir. 2015), itself stands on suspect footing, respondents cannot plausibly maintain that their actions fit within *Ybarra*'s narrow license. That case involved a debtor who *deliberately initiated new litigation*. See 424

---

[10] Even for minimal claims, a creditor can hardly suggest unfairness because it cannot troubled to spend any resources to determine if its action will violate the Code. Surely the cost wrongly imposed on the debtor for resisting will outweigh the creditor's imposition.

F.3d at 1023-1024. And the court merely "held that post-petition attorney fee awards are not discharged where post-petition, the debtor voluntarily 'pursue[d] a whole new course of litigation,' commenced litigation, or 're-turn[ed] to the fray' voluntarily." *Id.* at 1024. The court's emphasis was on the debtor's "voluntary" acts and conduct that *initiated* new proceedings and created new expense.

The Ninth Circuit confirmed the narrowness of *Ybarra* in *In re Castellino Villas, A.K.F. LLC*, 836 F.3d 1028 (9th Cir. 2016) (Ikuta, J.). *Castellino Villas* relied on *pre-existing* circuit authority to explain that contingent claims—like those at issue in pending litigation—that were in "fair contemplation" at the time of the bankruptcy are discharged:

> Accordingly, if a creditor and debtor are engaged in prepetition litigation pursuant to a contract that includes an attorneys' fees provision, and the creditor 'can fairly or reasonably contemplate' that it will have a claim for attorneys' fees if an 'extrinsic event' occurs (that is, if it prevails in the litigation), then the creditor's claim for attorneys' fees will be discharged in the debtor's bankruptcy even if the creditor incurs attorneys' fees after the debtor was discharged.

Id. at 1034. The court further grounded this reasoning in cases dating back to 2009, well before the bankruptcy at issue here. *Ibid.*; see also U.S. Br. 30 (citing authority for similar legal propositions regarding "'prepetition claim[s]'").

2. Respondents cannot plausibly justify their conduct under this authority. First, respondents were certainly aware of the pending litigation at the time of the bankruptcy; the litigation itself prompted the filing.

Second, respondents did *not* seek permission from any state court before pursuing post-discharge fees. Contra

Resp. Br. 1. They submitted a general judgment that proposed offsetting those fees, and they litigated the discharge issue in response to *petitioner's* discharge defense. See, *e.g.*, J.A. 63-69, 75-80, 81-83, 84-86. The state court did not rule on the issue until after petitioner had already been put through the burden and expense of litigating on parallel tracks in two separate tribunals (after he resorted to seeking relief in the bankruptcy court). Indeed, respondents even threatened to seek *additional* fees if petitioner refused to give in to their request. C.A. E.R. 694. This, again, was before any ruling on their initial fee motion.

Finally, there is no plausible basis for suggesting that petitioner "voluntarily" re-entered the litigation. Quite the contrary: petitioner immediately sought to be dismissed from the case, but respondents *opposed* the motion; petitioner resisted efforts to depose him a second time; and petitioner otherwise sought to "extricate" himself from the proceedings. Pet. Br. 5-6 & n.1. The very best respondents can do is argue that petitioner failed to formally drop his counterclaim for fees—a claim that became unwinnable once he moved to limit his involvement from the case. J.A. 116-117.

Respondents were certainly aware of their contingent claim for fees at the time of the discharge; the claim was listed on the schedules, and they themselves admit the claim for pre-petition fees were off the table. Respondents instead forced petitioner to engage in extensive litigation to avoid a fee award that was one of the driving forces of his actual bankruptcy.

3. Finally, respondents cannot avoid justifying their conduct directly by leaning on the reversed decisions of the state-trial court and bankruptcy court. As is true throughout multiple areas of the law ("abuse of discre-

tion"; "clear error" review, etc.), the fact that a judicial officer reaches a determination on an issue does not automatically establish its reasonableness. See, *e.g.*, *Wiggins* v. *Smith*, 539 U.S. 510 (2003) (AEDPA); *Xitronix* v. *KLA-Tencor Corp.*, 916 F.3d 429, 431 (5th Cir. 2019) (refusing to accept a transfer as "implausible"). A quick skim through the state appellate opinion and federal district court opinions—the ones that reversed the incorrect first-level rulings on these issues—emphatically show why that is so. See, *e.g.*, J.A. 112-117.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted.

JOHN M. BERMAN
7175 SW Beveland St., Ste. 210
Tigard, OR 97223

DANIEL L. GEYSER
Counsel of Record
GEYSER P.C.
One Energy Square
4925 Greenville Ave., Ste. 200
Dallas, TX 75206
(214) 800-2660
daniel.geyser@geyserpc.com

APRIL 2019

No. 18-489

In the Supreme Court of the United States

BRADLEY WESTON TAGGART, PETITIONER

v.

SHELLEY A. LORENZEN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING NEITHER PARTY

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
JOSEPH H. HUNT
Assistant Attorney General
MALCOLM L. STEWART
Deputy Solicitor General
SOPAN JOSHI
Assistant to the Solicitor General
MARK B. STERN
SARAH CARROLL
THOMAS J. CLARK
PAUL A. ALLULIS
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether, under the Bankruptcy Code, a creditor's subjective good-faith belief that the discharge injunction does not apply precludes a finding of civil contempt.

TABLE OF CONTENTS

Page

Interest of the United States 1
Statement 2
Summary of argument 9
Argument:
A creditor's subjective good faith does not preclude a finding of civil contempt, but civil-contempt remedies are not available if there is an objectively fair ground of doubt about whether the creditor's conduct violates a discharge order 13
A. Traditional principles governing injunctive relief apply to the enforcement of discharge orders entered in bankruptcy cases 13
B. The court of appeals erred in holding that a creditor's unreasonable good-faith belief that its collection efforts are lawful precludes the imposition of contempt sanctions 21
C. This Court should not adopt petitioner's proposed rule 24
D. The Court should vacate the judgment below and remand the case to allow the court of appeals to apply the correct standard in the first instance 29
Conclusion 32

TABLE OF AUTHORITIES

Cases:

Abbott Labs. v. *Unlimited Beverages, Inc.*, 218 F.3d 1238 (11th Cir. 2000) 20
Alyeska Pipeline Serv. Co. v. *Wilderness Soc'y*, 421 U.S. 240 (1975) 28
Axia NetMedia Corp. v. *Massachusetts Tech. Park Corp.*, 889 F.3d 1 (1st Cir. 2018) 17
Ben Franklin Hotel Assocs., In re, 186 F.3d 301 (3d Cir. 1999) 20

Cases—Continued: Page

CFE Racing Prods., Inc. v. *BMF Wheels, Inc.*, 793 F.3d 571 (6th Cir. 2015) 17, 22
California Artificial Stone Paving Co. v. *Molitor*, 113 U.S. 609 (1885) ..... *passim*
Canning, In re, 706 F.3d 64 (1st Cir. 2013) 4
Chambers v. *Nasco, Inc.*, 501 U.S. 32 (1991) 4, 26
Chao v. *Gotham Registry, Inc.*, 514 F.3d 280 (2d Cir. 2008) 20
City of New York v. *Mickalis Pawn Shop, LLC*, 645 F.3d 114 (2d Cir. 2011) 17
Cox v. *Zale Del., Inc.*, 239 F.3d 910 (7th Cir. 2001) 14
Cutter v. *Wilkinson*, 544 U.S. 709 (2005) 12, 31
First State Bank of Roscoe v. *Stabler*, 914 F.3d 1129 (8th Cir. 2019) 22
Food Lion, Inc. v. *United Food & Commercial Workers Int'l Union, AFL-CIO-CLC*, 103 F.3d 1007 (D.C. Cir. 1997) 22
Gascho v. *Global Fitness Holdings, LLC*, 875 F.3d 795 (6th Cir. 2017), cert. denied, 138 S. Ct. 2576 (2018) 17
Gervin, In re, 300 Fed. Appx. 293 (5th Cir. 2008) 20
Gompers v. *Bucks Stove & Range Co.*, 221 U.S. 418 (1911) 22, 31
Hardy, In re, 97 F.3d 1384 (11th Cir. 1996) 4, 5, 8, 24
Hutto v. *Finney*, 437 U.S. 678 (1978) 28
International Longshoremen's Ass'n v. *Philadelphia Marine Trade Ass'n*, 389 U.S. 64 (1967) 15
Jove Eng'g, Inc. v. *IRS*, 92 F.3d 1539 (11th Cir. 1996) 17, 18
Katchen v. *Landy*, 382 U.S. 323 (1966) 4, 27
Latino Officers Ass'n City of N.Y., Inc. v. *City of New York*, 558 F.3d 159 (2d Cir. 2009) 16

Cases—Continued: Page

McComb v. *Jacksonville Paper Co.*, 336 U.S. 187 (1949) 11, 22, 25, 26
Michaelson v. *United States ex rel. Chicago, St. Paul, Minneapolis & Omaha Ry. Co.*, 266 U.S. 42 (1924) 14
Morissette v. *United States*, 342 U.S. 246 (1952) 14
Northeast Women's Ctr., Inc. v. *McMonagle*, 939 F.2d 57 (3d Cir. 1991) 20
Pertuso v. *Ford Motor Credit Co.*, 233 F.3d 417 (6th Cir. 2000) 14
Robin Woods Inc. v. *Woods*, 28 F.3d 396 (3d Cir. 1994) 22, 23
Schmidt v. *Lessard*, 414 U.S. 473 (1974) 10
Sekhar v. *United States*, 570 U.S. 729 (2013) 14
Sherwood Park Bus. Ctr., LLC v. *Taggart*, 341 P.3d 96 (Or. App. 2014) 7
Shillitani v. *United States*, 384 U.S. 364 (1966) 22, 31
Spencer, In re, 868 F.3d 748 (8th Cir. 2017) 20
Swift & Co. v. *United States*, 196 U.S. 375 (1905) 16
Tennessee Student Assistance Corp. v. *Hood*, 541 U.S. 440 (2004) 27
TiVo Inc. v. *EchoStar Corp.*, 646 F.3d 869 (Fed. Cir. 2011) 16
United States v. *Saccoccia*, 433 F.3d 19 (1st Cir. 2005) 16, 17
United States v. *Stitt*, 139 S. Ct. 399 (2018) 31
United Student Aid Funds, Inc. v. *Espinosa*, 559 U.S. 260 (2010) 3
Williams, In re, 438 B.R. 679 (B.A.P. 10th Cir. 2010) 27
Ybarra, In re, 424 F.3d 1018 (2005), cert. denied, 547 U.S. 1163 (2006) 6, 12, 30

Cases—Continued: Page

Young v. *United States ex rel. Vuitton et Fils S. A.*, 481 U.S. 787 (1987) 13
Zilog, Inc., In re, 450 F.3d 996 (9th Cir. 2006) 4, 14

Statutes and rules:

Bankruptcy Code:
Ch. 1, 11 U.S.C. 101 *et seq*:
11 U.S.C. 101(5)(A) 30
11 U.S.C. 105 ..... 4, 5
11 U.S.C. 105(a) 4, 13, 14, 23
11 U.S.C. 106(a)(1) 4
Ch. 3, 11 U.S.C. 301 *et seq*:
11 U.S.C. 307 1
11 U.S.C. 362 5
11 U.S.C. 362(a) 5
11 U.S.C. 362(k) 10, 23
11 U.S.C. 362(k)(1) 5
Ch. 5, 11 U.S.C. 501 *et seq*:
11 U.S.C. 523(a) 2, 19
11 U.S.C. 523(a)(1)-(19) 2
11 U.S.C. 523(a)(1) 2
11 U.S.C. 523(a)(1)(C) 2
11 U.S.C. 523(a)(2) 3, 19, 26
11 U.S.C. 523(a)(4) 3, 19, 26
11 U.S.C. 523(a)(6) 3, 19, 26
11 U.S.C. 523(a)(7) 2
11 U.S.C. 523(a)(8) 2, 27
11 U.S.C. 523(a)(11) 2
11 U.S.C. 523(a)(12) 2
11 U.S.C. 523(a)(13) 2
11 U.S.C. 523(a)(14B) 2

Statutes and rules—Continued: Page

11 U.S.C. 523(a)(18) 2
11 U.S.C. 523(c)(1) 2, 19
11 U.S.C. 523(d) 28
11 U.S.C. 524 ..... 4, 5, 13, 14
11 U.S.C. 524(a)(2) ..... *passim*
Ch. 7, 11 U.S.C. 701 *et seq* 2, 3, 6, 30
11 U.S.C. 727 ..... 2, 30
11 U.S.C. 727(b) 30
Ch. 11, 11 U.S.C. 1101 *et seq* 2
11 U.S.C. 1141 2
Ch. 12, 11 U.S.C. 1201 *et seq* 2
11 U.S.C. 1228 2
Ch. 13, 11 U.S.C. 1301 *et seq* 2, 20
11 U.S.C. 1328 2
Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.* 25
Internal Revenue Code (26 U.S.C.):
§ 7433(e) 10, 23
§ 7433(e)(2)(A) 5
Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 3102(c)(1), 112 Stat. 730-731 (26 U.S.C. 7433(e)(1)) 5
28 U.S.C. 581-589a 1
28 U.S.C. 1334(b) 3, 27
Fed. R. Bankr. P.:
Rule 4007 3
Rule 9009(a) 3
Rule 9014(c) 17
Rule 9020 ..... 4, 17

Rules—Continued: Page

Fed. R. Civ. P.:

Rule 8(c)(1) advisory committee's note (2010 Amendment) 27

Rule 65(d) 16, 17, 18

Rule 65(d)(1)(B) 16

Rule 65(d)(1)(C) 16

Miscellaneous:

5 *Collier on Bankruptcy* (16th ed. 2013) 30

2 James L. High, *A Treatise on the Law of Injunctions* (4th ed. 1905) 22

Official Bankruptcy Form No. 18: Discharge of Debtor (Dec. 1, 2007), www.uscourts.gov/sites/default/files/b_018_1207.pdf 3, 30

Official Bankruptcy Form No. 318: Order of Discharge (Dec. 1, 2015), www.uscourts.gov/sites/default/files/form_b318_0.pdf 3, 4

In the Supreme Court of the United States

No. 18-489

BRADLEY WESTON TAGGART, PETITIONER

v.

SHELLEY A. LORENZEN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING NEITHER PARTY

INTEREST OF THE UNITED STATES

The question presented in this case concerns the circumstances under which a creditor may be subject to civil-contempt sanctions for attempting to collect a debt after the entry of a discharge order under the Bankruptcy Code. The Attorney General appoints United States Trustees to supervise the administration of bankruptcy cases and trustees throughout the country. 28 U.S.C. 581-589a. United States Trustees "may raise and may appear and be heard on any issue in any case or proceeding under" the Bankruptcy Code. 11 U.S.C. 307. The United States also is the Nation's largest creditor. Federal agencies often seek to recover debts from persons who have filed for bankruptcy, and the application of the discharge order to debts owed to the govern-

ment is not always readily apparent. The question presented therefore is of substantial importance to the United States.

STATEMENT

1. a. When a debtor successfully completes its bankruptcy case, the bankruptcy court typically enters a discharge order releasing the debtor from liability for most pre-bankruptcy debts. See 11 U.S.C. 727 (Chapter 7), 1141 (Chapter 11), 1228 (Chapter 12), and 1328 (Chapter 13). A discharge order "operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such [discharged] debt as a personal liability of the debtor." 11 U.S.C. 524(a)(2).

Although most pre-bankruptcy debts are discharged by such an order, certain debts are not, see 11 U.S.C. 523(a)(1)-(19), including various categories of debts commonly held by the government, *e.g.*, 11 U.S.C. 523(a)(1), (7), (8), (11), (12), (13), (14B), and (18). Often it is clear whether a particular debt falls into one of these exceptions to discharge. There rarely is any doubt, for example, whether a debt is one for "payment of an order of [criminal] restitution." 11 U.S.C. 523(a)(13). Other times it is not so clear, as with tax debts "with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax." 11 U.S.C. 523(a)(1)(C). Whether a debtor "willfully attempted" to "evade or defeat" a tax can be a hotly contested question.

With respect to some of the potentially nondischargeable debts listed in Section 523(a), the Code states that a particular debt will be discharged unless a party obtains an advance determination to the contrary from the bankruptcy court. 11 U.S.C. 523(c)(1); see

11 U.S.C. 523(a)(2), (4), and (6). And for student-loan debts, a debtor must file an adversary complaint in the bankruptcy case, and obtain a determination that the debt is dischargeable, or the debt will not be discharged. See *United Student Aid Funds, Inc.* v. *Espinosa*, 559 U.S. 260, 268-269 (2010). With respect to most types of debts, however, no advance determination as to dischargeability is necessary, and the question whether a particular debt has been discharged is left for future resolution. Cf. Fed. R. Bankr. P. 4007. That resolution need not occur in the bankruptcy court. Rather, other courts, including state courts, have concurrent jurisdiction to resolve dischargeability disputes—as, for instance, when discharge is raised as a defense in a state-court collection action. See 28 U.S.C. 1334(b) (vesting district courts with "original but not exclusive jurisdiction of all civil proceedings arising under title 11").

Dischargeability disputes arise most frequently in Chapter 7 cases. Most Chapter 7 cases are resolved relatively quickly, and the typical discharge order simply identifies the debtor and states that a "discharge under 11 U.S.C. § 727 is granted." Official Bankruptcy Form No. 318, at 1, www.uscourts.gov/sites/default/files/form_b318_0.pdf; see Official Bankruptcy Form No. 18 (superseded Dec. 1, 2015), www.uscourts.gov/sites/default/files/b_018_1207.pdf; see also Fed. R. Bankr. P. 9009(a). Rather than identify the particular debts of the debtor that are (or are not) discharged, the standard Chapter 7 discharge order typically includes an "[e]xplanation" stating that "[m]ost debts are covered by the discharge, but not all," and that "[b]ecause the law is complicated, you should consult an attorney to determine the exact effect of the discharge in this case." Official Bankruptcy Form No. 318, at 1-2 (emphasis

omitted); see *id.* at 2 (listing "[e]xamples of debts that are not discharged"). A summary discharge of this type is consistent with the need "'to secure a prompt and effectual administration and settlement of the estate of all bankrupts within a limited period,'" which is "a chief purpose of the bankruptcy laws." *Katchen* v. *Landy*, 382 U.S. 323, 328 (1966) (citation omitted).

b. Although Section 524 states that a discharge order "operates as an injunction" against any attempt to collect a discharged debt, 11 U.S.C. 524(a)(2), it does not prescribe a remedy for violations of the discharge injunction. Section 105, however, authorizes a bankruptcy court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of" the Bankruptcy Code. 11 U.S.C. 105(a).

Courts have read Sections 105(a) and 524(a)(2), taken together, as authorizing civil-contempt actions against creditors who attempt to collect discharged debts. *E.g.*, *In re Canning*, 706 F.3d 64, 69 (1st Cir. 2013); *In re Zilog, Inc.*, 450 F.3d 996, 1007 (9th Cir. 2006); see Fed. R. Bankr. P. 9020 (recognizing that bankruptcy courts may conduct contempt proceedings). Since the United States has waived its sovereign immunity for purposes of Section 105, the power to impose civil-contempt remedies generally extends to governmental creditors. See 11 U.S.C. 106(a)(1). Some courts have stated that a bankruptcy court also has inherent power to enforce a discharge injunction through civil-contempt sanctions, but that such power should be exercised with "restraint" and only when the creditor engages in "bad-faith conduct." *In re Hardy*, 97 F.3d 1384, 1389 (11th Cir. 1996) (quoting *Chambers* v. *Nasco, Inc.*, 501 U.S. 32, 44, 50 (1991)).

Two related provisions bear mention. First, under Section 362, the filing of a petition for bankruptcy "operates as a stay" of most collection or enforcement efforts against the debtor during the pendency of the bankruptcy case. 11 U.S.C. 362(a). Unlike with the discharge injunction, the Bankruptcy Code prescribes a specific remedy for certain violations of the automatic stay: "an individual injured by any willful violation of [the automatic] stay" generally "shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages." 11 U.S.C. 362(k)(1).

Second, Congress amended the Internal Revenue Code in 1998 to provide that, if an IRS officer or employee "willfully violates" either the automatic stay or the discharge injunction, the affected taxpayer "may petition the bankruptcy court to recover damages against the United States." Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 3102(c)(1), 112 Stat. 730-731 (26 U.S.C. 7433(e)(1)). With respect to discharge violations, "such petition shall be the exclusive remedy for recovering damages" against the IRS. 26 U.S.C. 7433(e)(2)(A).

Both of these provisions require a "willful" violation of the automatic stay or discharge injunction before a court may award damages to the debtor. 11 U.S.C. 362(k)(1); see 26 U.S.C. 7433(e)(1). Although neither Section 105 nor Section 524 uses that term, some courts have said that the imposition of civil-contempt sanctions under Section 105 likewise requires a "willful" violation of the discharge injunction. *E.g.*, *Hardy*, 97 F.3d at 1390; Pet. App. 58a (bankruptcy-court decision below).

2. a. This case arises out of a business dispute. Petitioner once held an interest in an Oregon company.

Pet. App. 4a. Respondents are the company's other owners, their former attorney (now replaced by the executor of his estate), and the company itself. *Id.* at 4a-5a. (For simplicity, this brief will use the term "respondents" even when referring only to some of them, unless the distinction is material.)

Believing that petitioner had improperly attempted to transfer his interest in the company without offering the other owners a right of first refusal, respondents sued petitioner in state court. Pet. App. 5a. Shortly before trial, petitioner filed a voluntary petition for bankruptcy under Chapter 7. *Ibid.* The state-court action was stayed pending completion of the bankruptcy case. *Ibid.*

After petitioner received a bankruptcy discharge, respondents resumed the state-court litigation. Pet. App. 5a. In light of the discharge order, respondents abandoned their monetary claims and instead sought only injunctive relief to unwind the transfer of petitioner's interest in, and to expel petitioner from, the company. *Id.* at 5a-6a. After the court granted that relief, respondents filed a petition for attorney's fees, limited to "those fees that had been incurred after the date of [petitioner's] bankruptcy discharge." *Id.* at 6a.

Respondents' fee petition "alerted the state court to the existence of [petitioner's] bankruptcy discharge." Pet. App. 6a. Relying on in *In re Ybarra*, 424 F.3d 1018 (9th Cir. 2005), cert. denied, 547 U.S. 1163 (2006), however, respondents contended that a claim for attorney's fees incurred after the bankruptcy case commenced, even if arising from litigation that was initiated before the bankruptcy, is not discharged if the debtor has "'returned to the fray'" by "willingly engag[ing]" in further post-discharge litigation. Pet. App. 6a-7a. The state

court concluded that petitioner had returned to the fray, and it therefore granted the fee petition. *Id.* at 7a.

Meanwhile, petitioner moved the bankruptcy court to hold respondents "in contempt for violating the discharge by seeking an award of attorneys' fees against him in the state court action." Pet. App. 7a. The bankruptcy court at first denied the motion, Br. in Opp. App. 12a-35a, but the district court reversed that denial, finding that petitioner's actions "were not sufficiently affirmative and voluntary to be considered returning to the fray" under *Ybarra*, *id.* at 11a. Relying on the district court's reversal, the state appellate court then reversed the trial court's grant of fees. *Sherwood Park Bus. Ctr., LLC* v. *Taggart*, 341 P.3d 96, 104 (Or. App. 2014).

b. On remand from the district court, the bankruptcy court held respondents in contempt for violating the discharge injunction. Pet. App. 52a-64a.

The bankruptcy court stated that "[a]n alleged contemnor's violation of the discharge injunction must be 'willful' in order to be subject to sanctions for violating the discharge injunction." Pet. App. 58a. To establish willfulness, the court explained, petitioner was required to prove "first, that the alleged contemnor knew that the discharge injunction applied, and second, that the alleged contemnor intended the actions that violated the discharge injunction." *Ibid.* The court observed that there was "no dispute" that the second element was satisfied. *Id.* at 63a.

As to the first inquiry, and relying on the Eleventh Circuit's decision in *Hardy*, the bankruptcy court interpreted the phrase "knew that the discharge injunction *applied*," Pet. App. 58a (emphasis added), to mean

"knew the discharge was '*invoked*,'" *id.* at 59a (emphasis added). In the bankruptcy court's view, that test "in effect imposes a strict liability standard": a creditor need only be "'aware of the discharge injunction,'" and need not know that the injunction applies to the particular debt at issue. *Id.* at 60a (quoting *Hardy*, 97 F.3d at 1390); see *ibid.* ("Only lack of notice of the discharge may serve as a defense to contempt sanctions."). The court observed that "it is not disputed that Respondents had actual knowledge" of the existence of petitioner's discharge, *id.* at 61a, and were thus "on notice that seeking fees from [petitioner] might implicate the discharge injunction," *id.* at 63a.

After an evidentiary hearing, the bankruptcy court awarded petitioner slightly more than $105,000 in attorney's fees and costs; $5000 in damages for emotional distress; and $2000 in punitive damages. Pet. App. 69a, 75a.

c. The bankruptcy appellate panel (BAP) reversed. Pet. App. 21a-51a. In the BAP's view, and contrary to *Hardy*, civil contempt is an appropriate remedy for a violation of a discharge order only if "the alleged contemnor was aware of the discharge injunction *and* aware that it applied to his or her claim." *Id.* at 44a; see *id.* at 36a (criticizing the bankruptcy court for following *Hardy*). The BAP found that "the scope of the discharge order here was ambiguous with respect to the post-discharge attorneys' fees and costs," *id.* at 46a, as evidenced in part by the state trial court's initial holding "that the discharge did not bar [respondents'] claim for attorneys' fees," *id.* at 47a. The BAP concluded that respondents "could not possibly have been aware that the discharge injunction was applicable to their fee request until the *Ybarra* question was adjudicated." *Id.* at 50a.

The BAP explained that "[a]lthough the discharge order was in place at the time [respondents] made their fee request in the state court, the order itself did not advise [respondents] of the scope of the injunction under the *Ybarra* rule." *Id.* at 51a.

3. The court of appeals affirmed. Pet. App. 1a-15a. The court agreed with the bankruptcy court that civil contempt requires a showing "that the creditor (1) knew the discharge injunction was applicable and (2) intended the actions which violated the injunction." *Id.* at 11a (citation omitted). Like the BAP, however, the court of appeals rejected the bankruptcy court's near-strict-liability gloss on that test, explaining that "knowledge of the applicability of the injunction * * * may not be inferred simply because the creditor knew of the bankruptcy proceeding." *Ibid.* Rather, the court of appeals stated, a "creditor's good faith belief that the discharge injunction does not apply to the creditor's claim precludes a finding of contempt, even if the creditor's belief is unreasonable." *Id.* at 12a.

The court of appeals agreed with the BAP's finding that, when respondents sought attorney's fees in the state-court proceeding, they "possessed a good faith belief that the discharge injunction did not apply to their claims based on their contention that [petitioner] had 'returned to the fray.'" Pet. App. 13a. The court stated that respondents had "relied on the state court's judgment that the discharge injunction did not apply to their claim for post-petition attorneys' fees," and that "their good faith belief, even if unreasonable, insulated them from a finding of contempt." *Ibid.*

SUMMARY OF ARGUMENT

A. By specifying that a discharge order "operates as an injunction," 11 U.S.C. 524(a)(2), Congress indicated

that bankruptcy courts have the same powers to enforce their discharge orders as courts have to enforce any other injunction in the ordinary civil context. One of the fundamental principles governing the enforcement of ordinary civil injunctions is that civil-contempt sanctions may not be imposed if there is a fair ground of doubt that the conduct at issue violated the injunction. *California Artificial Stone Paving Co.* v. *Molitor*, 113 U.S. 609, 618 (1885). Indeed, "basic fairness requires that those enjoined receive explicit notice of precisely what conduct is outlawed." *Schmidt* v. *Lessard*, 414 U.S. 473, 476 (1974) (per curiam).

These principles should apply with equal force in the bankruptcy-discharge context. Nothing in the Bankruptcy Code indicates that enforcement of a discharge order should be governed by standards different from those that apply to enforcement of ordinary civil injunctions. The fact that Congress has expressly modified the remedies for violations of other bankruptcy provisions, but has not done so for violations of the discharge injunction (except for violations committed by the IRS), reinforces the inference that the traditional standard for civil contempt should continue to govern here. Cf. 11 U.S.C. 362(k); 26 U.S.C. 7433(e).

Unlike an ordinary civil injunction, which typically specifies the precise conduct that is prohibited, a bankruptcy discharge order usually does not state which debts are and are not discharged. With respect to the large majority of debts, however, the Bankruptcy Code provides a clear answer to that question. But with respect to the subset of debts whose dischargeability is reasonably in doubt, it is both consistent with traditional equitable principles, and important to the proper balancing of debtor and creditor interests, that the

availability of civil-contempt sanctions be governed by the traditional "fair ground of doubt" standard.

B. The court of appeals erred in suggesting that an unreasonable subjective good-faith belief that particular conduct is consistent with a discharge order precludes a finding of civil contempt. "Since the purpose [of civil contempt] is remedial, it matters not with what intent the defendant did the prohibited act." *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949). A putative contemnor's good faith might be relevant to the determination whether there exists, as an objective matter, a fair ground of doubt about whether the debt has been discharged. The court of appeals in this case, however, did not treat respondents' subjective good faith as evidence of objective reasonableness. Rather, the court erroneously held that respondents' subjective good faith standing alone precluded the imposition of contempt sanctions, even if respondents' belief in the legality of their conduct was objectively *un*reasonable.

C. Petitioner's proposed standard also is incorrect. Petitioner supports the near-strict-liability standard for contempt adopted by the bankruptcy court below and by the Eleventh Circuit in *Hardy*. Under that standard, a creditor is subject to contempt as long as it was aware of the existence of the discharge and then intentionally committed an act that a court later determines violated the discharge injunction. That standard is incompatible with the traditional standards governing enforcement of injunctions, since it authorizes imposition of civil-contempt remedies even in circumstances where the applicability of the discharge order to a particular debt was in reasonable doubt at the time the collection efforts occurred.

Petitioner argues that, in order to insulate themselves from potential contempt sanctions, creditors should be required to seek an advance determination of dischargeability from the bankruptcy court rather than litigating the question during collection proceedings brought in other forums. That approach would often be impractical, especially in cases involving governmental creditors, and would unduly hamper creditors' rights to recover non-discharged debts owed to them. It also would create artificial incentives for creditors to seek advance bankruptcy-court determinations whenever they believe particular debts to be nondischargeable, despite Congress's express judgment that only three statutory exceptions to discharge require such advance determinations.

D. Respondents may ultimately prevail under the traditional standards governing injunctive relief and civil contempt, by establishing a fair ground of doubt about whether respondents' conduct violated the discharge order. See *In re Ybarra*, 424 F.3d 1018, 1026-1027 (9th Cir. 2005), cert. denied, 547 U.S. 1163 (2006). That the courts below disagreed on the question supports that conclusion. Cf. *California Artificial Stone Paving*, 113 U.S. at 618 ("If the judges disagree there can be no judgment of contempt."). This Court, however, is one "of review, not of first view." *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005). The Court accordingly should vacate the judgment below and remand the case to allow the lower courts to make that determination in the first instance.

ARGUMENT

A CREDITOR'S SUBJECTIVE GOOD FAITH DOES NOT PRECLUDE A FINDING OF CIVIL CONTEMPT, BUT CIVIL-CONTEMPT REMEDIES ARE NOT AVAILABLE IF THERE IS AN OBJECTIVELY FAIR GROUND OF DOUBT ABOUT WHETHER THE CREDITOR'S CONDUCT VIOLATES A DISCHARGE ORDER

A. Traditional Principles Governing Injunctive Relief Apply To The Enforcement Of Discharge Orders Entered In Bankruptcy Cases

Under traditional equitable principles, a litigant may not be held in civil contempt for violating an injunction if there exists a fair ground of doubt about whether the injunction prohibited the challenged acts. That traditional principle applies to the enforcement of bankruptcy discharge orders as well.

1. Under the Bankruptcy Code, a discharge order "operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any [discharged] debt as a personal liability of the debtor, whether or not discharge of such debt is waived." 11 U.S.C. 524(a)(2). Although Section 524 does not specify a remedy for violations of the discharge injunction, Section 105(a) authorizes a court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of" Title 11. 11 U.S.C. 105(a).

Taken together, these provisions incorporate general principles of injunctive relief, including the principles that govern the imposition of sanctions for contempt. Contempt is the traditional means by which courts enforce their injunctions. See, *e.g.*, *Young* v. *United States ex rel. Vuitton et Fils S. A.*, 481 U.S. 787, 796 (1987). Indeed, a court's power to impose contempt

"is essential to the administration of justice." *Michaelson* v. *United States ex rel. Chicago, St. Paul, Minneapolis & Omaha Ry. Co.*, 266 U.S. 42, 65 (1924).

"[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed." *Morissette* v. *United States*, 342 U.S. 246, 263 (1952); see *Sekhar* v. *United States*, 570 U.S. 729, 733 (2013). Particularly when read in light of that interpretive principle, the statutory directive that a discharge order "operates as an injunction," 11 U.S.C. 524(a)(2), is best understood to authorize bankruptcy courts to enforce their discharge orders under Section 105(a) in accordance with the same principles that govern courts' traditional powers to enforce their injunctions. Consistent with that natural understanding of the statutory text, courts of appeals largely have recognized that the imposition of civil contempt for violations of a discharge injunction "is governed by the same standards * * * applicable to all civil contempt proceedings." *In re Zilog, Inc.*, 450 F.3d 996, 1008 n.12 (9th Cir. 2006); cf. *Cox* v. *Zale Del., Inc.*, 239 F.3d 910, 916 (7th Cir. 2001) (Posner, J.) (looking to "standard remedies in cases of civil contempt"); *Pertuso* v. *Ford Motor Credit Co.*, 233 F.3d 417, 421 (6th Cir. 2000) (explaining that "[t]he obvious purpose" of Section 524 "is to enjoin the proscribed conduct," and that "the traditional remedy for violation of an injunction lies in contempt proceedings").

2. One fundamental principle governing enforcement of injunctions is that civil-contempt sanctions may

not be imposed if there is an objectively fair ground of doubt that the conduct at issue violated the injunction. In *California Artificial Stone Paving Co.* v. *Molitor*, 113 U.S. 609 (1885), for example, this Court agreed with the lower court's refusal to impose contempt, and it ordered that the case be dismissed. *Id.* at 618. The defendant in *California Artificial Stone Paving* previously had been enjoined from infringing a patent that protected "an improvement in concrete pavement." *Id.* at 610. The improvement consisted of "laying the pavement in detached blocks" instead of in a "continuous sheet," which was "liable to crack in irregular directions." *Id.* at 610-611. After the injunction was issued, the defendant "varied his mode of making" pavement by no longer making "separate and detached blocks," but "only making a mark or indentation on the surface" of a large sheet, which apparently was "sufficient to produce the results obtained by [the patented] process." *Id.* at 613.

The lower-court judges disagreed about whether the defendant's new production method infringed the patent, and the circuit judge decreed that the defendant could not be held in contempt for violating the injunction. *California Artificial Stone Paving*, 113 U.S. at 613. On appeal, this Court stated that "[i]f the [lower court] judges disagree" about whether the defendant had violated the injunction, "there can be no judgment of contempt." *Id.* at 618. The Court explained that "[p]rocess of contempt is a severe remedy, and should not be resorted to where there is fair ground of doubt as to the wrongfulness of the defendant's conduct." *Ibid.*

An objectively fair ground of doubt about the applicability of an injunction can arise from a lack of clarity in the terms of the injunction itself. In *International Longshoremen's Association* v. *Philadelphia Marine*

Trade Association, 389 U.S. 64 (1967), this Court reversed a finding of contempt that had been entered against a union for violating an order requiring compliance with an arbitral award. *Id.* at 74. The Court observed that the order "contain[ed] only an abstract conclusion of law, not an operative command capable of 'enforcement.'" *Ibid.* Echoing *California Artificial Stone Paving*, the Court warned that "[t]he judicial contempt power is a potent weapon" and that "[w]hen it is founded upon a decree too vague to be understood, it can be a deadly one." *Id.* at 76. To that end, this Court has long cautioned that "defendants ought to be informed as accurately as the case permits what they are forbidden to do." *Swift & Co.* v. *United States*, 196 U.S. 375, 401 (1905). An "injunction to obey the law" is thus unenforceable, *ibid.*, in part because "a general injunction against all possible breaches of the law" would be too "vague" to justify putting a defendant "at the peril of a summons for contempt," *id.* at 396. Federal Rule of Civil Procedure 65(d) incorporates these traditional principles, requiring "[e]very order granting an injunction" to "state its terms specifically" and to "describe in reasonable detail * * * the act or acts restrained or required." Fed. R. Civ. P. 65(d)(1)(B) and (C).

Lower courts routinely apply the "fair ground of doubt" standard in deciding whether the defendant should be sanctioned for violating an injunction in the ordinary civil context. See, *e.g.*, *TiVo Inc.* v. *EchoStar Corp.*, 646 F.3d 869, 882 (Fed. Cir. 2011) (en banc); *Latino Officers Ass'n City of N.Y., Inc.* v. *City of New York*, 558 F.3d 159, 164-165 (2d Cir. 2009); *United States* v. *Saccoccia*, 433 F.3d 19, 28 (1st Cir. 2005). Consistent with that test, courts recognize that injunctions must "have clearly and unambiguously forbidden the

precise conduct on which the contempt allegation is based" before the court may impose contempt sanctions. *Saccoccia*, 433 F.3d at 28 (emphasis omitted); see, *e.g.*, *CFE Racing Prods., Inc.* v. *BMF Wheels, Inc.*, 793 F.3d 571, 598 (6th Cir. 2015) (contempt available only for violation of "a definite and specific order of the court" listing "particular act or acts" that are forbidden) (citations omitted); *City of New York* v. *Mickalis Pawn Shop, LLC*, 645 F.3d 114, 144 (2d Cir. 2011) ("an injunction must be more specific than a simple command that the defendant obey the law") (citation omitted); cf. *Jove Eng'g, Inc.* v. *IRS*, 92 F.3d 1539, 1546 (11th Cir. 1996) (statutory injunctions must be "clear, definite and unambiguous" to support contempt). And in applying that test, courts generally resolve ambiguities in favor of the putative contemnor. See, *e.g.*, *Axia NetMedia Corp.* v. *Massachusetts Tech. Park Corp.*, 889 F.3d 1, 13 (1st Cir. 2018); *Gascho* v. *Global Fitness Holdings, LLC*, 875 F.3d 795, 800 (6th Cir. 2017), cert. denied, 138 S. Ct. 2576 (2018).

3. There is no reason these traditional principles cannot apply to the bankruptcy context here. To be sure, Rule 65(d) does not directly apply to a bankruptcy discharge order or to bankruptcy contempt proceedings. See Fed. R. Bankr. P. 9014(c), 9020. And neither Rule 65(d) nor Section 524(a)(2) requires a discharge order to identify which debts are discharged with the kind of specificity that Rule 65(d) requires for an ordinary civil injunction. Application of Rule 65(d)'s specificity requirements to bankruptcy discharge orders would be both undesirable and inconsistent with longstanding bankruptcy practice. See pp. 3-4, *supra*. But Congress's directive that a discharge order "*operates* as an injunction," 11 U.S.C. 524(a)(2) (emphasis added),

nevertheless has important implications for *enforcement* of a discharge order once it has been entered. In particular, that directive indicates that contempt-like remedies should be unavailable when a creditor had reasonable grounds for doubting that particular conduct would violate the discharge order, even if the court ultimately determines that a violation occurred.

In one important respect, application of that principle in the bankruptcy-discharge setting differs from enforcement of a usual civil injunction. If an ordinary injunction complies with the specificity requirements of Rule 65(d), the requisite clear notice that particular conduct is prohibited usually will appear within the four corners of the injunction itself. Bankruptcy discharge orders, by contrast, typically decree that all dischargeable debts are discharged, without specifying *which* debts are dischargeable. Cf. *Jove Eng'g*, 92 F.3d at 1546. To determine whether a discharge order prohibits continued efforts to collect a particular debt, a creditor therefore must look beyond the four corners of the order itself and consult the applicable provisions of the Bankruptcy Code.

Despite that difference, the "no fair ground of doubt" standard can cogently be applied to circumstances where a creditor continues to undertake collection efforts after a discharge order has been entered. But in determining whether a fair ground of doubt exists, the court in deciding whether contempt sanctions are warranted should not limit its inquiry to the express terms of the discharge order. A bankruptcy discharge could not serve its intended purpose if a creditor could continue efforts to collect discharged debts and then avoid contempt sanctions simply by pointing out that the or-

der itself did not specify which debts had been discharged. Rather, the court should ask whether the discharge order, read in light of and in conjunction with the applicable Code provisions, left legitimate doubt as to the discharge of a particular debt.

With respect to the large majority of debts owed by persons who obtain bankruptcy discharges, the applicable law will leave no fair ground of doubt that the debt has been discharged, even if the discharge order standing alone does not speak to the point. Absent an allegation of fraud, for example, prepetition consumer debts (including credit-card debts) are unlikely to fall within any of the statutory exceptions to discharge listed in 11 U.S.C. 523(a). A creditor who attempts to collect such debts thus likely could not show a "fair ground of doubt" that the debt survived the discharge. *California Artificial Stone Paving*, 113 U.S. at 618. And for certain categories of debt, the Code provides that the debt will be discharged unless the bankruptcy court makes an advance determination to the contrary. 11 U.S.C. 523(c)(1); see 11 U.S.C. 523(a)(2), (4), and (6). A creditor who fails to obtain an advance determination before attempting to collect these types of debts also would have no valid defense to contempt.

Moreover, under established equitable principles, the "fair ground of doubt" inquiry should be conducted on a debt-by-debt basis. Even when real doubt exists as to whether *one* debt has been discharged, there may be no similar uncertainty as to the dischargeability of the debtor's *other* debts. A creditor who attempts to collect a clearly- discharged debt in that circumstance can be subjected to contempt sanctions, notwithstanding the existence of real uncertainty about a different aspect of the discharge order's scope. That result follows

from the established rule that, even if an injunction is unclear in some respects, the court may impose civil-contempt sanctions if there is no fair ground of doubt that the injunction prohibited the specific conduct in which the alleged contemnor engaged. See, *e.g.*, *Chao* v. *Gotham Registry, Inc.*, 514 F.3d 280, 292 (2d Cir. 2008) (evaluating "not whether the decree is clear in some general sense, but whether it unambiguously proscribes the challenged conduct"); *Abbott Labs.* v. *Unlimited Beverages, Inc.*, 218 F.3d 1238, 1241 (11th Cir. 2000); *Northeast Women's Ctr., Inc.* v. *McMonagle*, 939 F.2d 57, 64 n.11 (3d Cir. 1991).

But where there is an objectively reasonable dispute about whether a particular debt has been discharged, it is both consistent with traditional equitable principles, and important to the achievement of an appropriate balance between debtor and creditor interests, to hold that a creditor's attempt to collect *that debt* cannot subject it to civil contempt. In an analogous Chapter 13 context involving a claimed violation of a plan confirmation, the Eighth Circuit recently declined to hold a state agency in civil contempt for seeking to collect domestic-support obligations from the debtors because the agency "had a reasonable basis for believing that the * * * debt would survive the Chapter 13 bankruptcy case." *In re Spencer*, 868 F.3d 748, 752 (2017). "Even if [the agency] was wrong on the merits," the court held, "its action did not warrant a contempt order and sanctions." *Ibid.*; see, *e.g.*, *In re Gervin*, 300 Fed. Appx. 293, 301 (5th Cir. 2008) (per curiam) (no contempt where applicability of the discharge injunction to the claim was unsettled and "caused extensive litigation"); *In re Ben Franklin Hotel Assocs.*, 186 F.3d 301, 309 (3d Cir. 1999) (no contempt where creditor had "at least a colorable argument").

The fact that contempt remedies are unavailable in those circumstances does not mean that *no* relief can be awarded. If a creditor successfully collects a discharged debt after the discharge order has been entered, the bankruptcy court can direct the creditor to return the property it has collected in violation of the order, even if the existence of reasonable doubt about dischargeability at the time of collection precludes the imposition of contempt sanctions. And going forward, an order directing the creditor to return the property in those circumstances would remove any fair ground of doubt about whether the debt had been discharged, thus exposing the creditor to contempt sanctions if it renewed its collection efforts.

B. The Court Of Appeals Erred In Holding That A Creditor's Unreasonable Good-Faith Belief That Its Collection Efforts Are Lawful Precludes The Imposition Of Contempt Sanctions

Consistent with the principles described above, the court of appeals observed that civil contempt is available only where the movant can establish that the alleged contemnor "violated a specific and definite order of the court." Pet. App. 11a. Relying on Ninth Circuit precedent, however, the court also stated that "the creditor's good faith belief that the discharge injunction does not apply to the creditor's claim precludes a finding of contempt, even if the creditor's belief is unreasonable." *Id.* at 12a. The court found it to be undisputed that respondents "possessed a good faith belief that the discharge injunction did not apply to their claims because [petitioner] had 'returned to the fray,'" *id.* at 13a, and it held that respondents' "good faith belief, even if unreasonable, insulated them from a finding of contempt,"

ibid. The court of appeals erred in treating subjective bad faith as a prerequisite to contempt remedies.

Under traditional principles governing the enforcement of ordinary civil injunctions, subjective bad intent is not required to support a finding of civil contempt. Unlike criminal contempt, civil contempt is "remedial," not "punitive." *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418, 441 (1911); *Shillitani* v. *United States*, 384 U.S. 364, 369 (1966). "Since the purpose is remedial, it matters not with what intent the defendant did the prohibited act." *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949); see 2 James L. High, *A Treatise on the Law of Injunctions* § 1418, at 1427 (4th ed. 1905) ("Nor does the question of the motive or intent with which the writ was disobeyed alter or vary the responsibility for the violation.").

Courts of appeals thus generally recognize that "[t]he 'intent of the recalcitrant party is irrelevant' in a civil contempt proceeding," *Food Lion, Inc.* v. *United Food & Commercial Workers Int'l Union, AFL-CIO-CLC*, 103 F.3d 1007, 1016 (D.C. Cir. 1997) (citation omitted), and that "good faith is not a defense to civil contempt," *Robin Woods Inc.* v. *Woods*, 28 F.3d 396, 399 (3d Cir. 1994). See *CFE Racing Prods.*, 793 F.3d at 598 ("no requirement to show intent" to impose contempt); but see *First State Bank of Roscoe* v. *Stabler*, 914 F.3d 1129, 1140 (8th Cir. 2019) ("Sanctions generally should be unavailable where a creditor acts * * * in good faith reliance on the belief that their actions are permissible."). Respondents have identified no reason why a different rule should apply in the bankruptcy context. Cf. Br. in Opp. 26 n.9 (discussing *McComb*).

With respect to certain bankruptcy-law violations—*e.g.*, violations of the automatic stay and certain violations by the IRS—Congress has specified a particular mental-state requirement and the penalties that may be imposed. See 11 U.S.C. 362(k); 26 U.S.C. 7433(e). By contrast, the Bankruptcy Code does not specify any mental-state requirement to discipline violations of a discharge order under Section 105(a). The Code's directive that a discharge order should "operate[] as an injunction," 11 U.S.C. 524(a)(2), therefore, is best understood to incorporate the traditional principles governing ordinary civil injunctions, under which a subjective good-faith belief, standing alone, does not preclude a finding of civil contempt.

To be sure, a defendant's subjective good-faith belief that it is complying with an injunction might sometimes be relevant to the determination whether the belief was objectively reasonable, *i.e.*, whether there was "fair ground of doubt" that the injunction proscribed the defendant's conduct. But the court of appeals in this case did not treat respondents' subjective good faith as evidence of objective reasonableness. Rather, the court stated that respondents' "good faith belief, *even if unreasonable*, insulated them from a finding of contempt." Pet. App. 13a (emphasis added); see *id.* at 12a. That holding has no basis in the general principles that govern enforcement of civil injunctions. If there is no objectively reasonable ground for disputing that an injunction proscribes particular conduct, a party who engages in that conduct cannot avoid civil contempt by claiming confusion about the order's scope. See, *e.g.*, *Robin Woods*, 28 F.3d at 399 (imposing sanctions where the injunction left "no ground to doubt the wrongfulness

of the conduct" at issue). And given Congress's directive that a bankruptcy discharge order "operates as an injunction," 11 U.S.C. 524(a)(2), there is no sound basis for treating subjective good faith as determinative in the discharge-violation context.

C. This Court Should Not Adopt Petitioner's Proposed Rule

Although the court of appeals erred in treating respondents' subjective good faith as precluding imposition of contempt sanctions, petitioner's proposed rule also is flawed. Petitioner endorses (Br. 18-19; Pet. 27-31) the standard applied by the bankruptcy court below and by the Eleventh Circuit in *In re Hardy*, 97 F.3d 1384 (1996). Under that approach, a creditor who violates a discharge order can be held in contempt, even if it reasonably believed that its conduct was consistent with the order, so long as the creditor was "aware of the discharge injunction" and "intended the actions" that violated it. *Id.* at 1390. That standard is incorrect and leads to impractical results.

1. The standard that petitioner advocates is inconsistent with the principles that govern imposition of civil-contempt sanctions for violations of ordinary civil injunctions. Under petitioner's proposed rule, civil contempt is justified as long as the creditor (1) knows of the existence of the discharge injunction and (2) intentionally takes an act that a court later determines was prohibited by that injunction. Pet. Br. 19; *Hardy*, 97 F.3d at 1390. If a court determines that the debt at issue was discharged, the second element almost always will be satisfied, since the sorts of collection efforts (such as filing a collection lawsuit) that would violate a discharge order rarely will be undertaken accidentally (*i.e.*, unin-

tentionally). As a practical matter, adoption of petitioner's approach thus would mean that, whenever the bankruptcy court determines that a violation of its discharge order has occurred, the violator can be subjected to contempt sanctions so long as it knew of the discharge order itself, no matter how reasonable the creditor's position that its own collection activities involved a nondischargeable debt.

That expansive conception of civil contempt is inconsistent with the traditional equitable principles described above. Under those principles, a person who is found to have violated an injunction cannot be held in contempt based solely on proof that he knew the injunction existed. Rather, it must be shown that the injunction left no fair ground of doubt that it prohibited the specific actions in which the putative contemnor engaged. See *California Artificial Stone Paving*, 113 U.S. at 618. Similarly in the bankruptcy-discharge context, a creditor who violates the discharge order cannot be held in contempt if there was fair ground of doubt that the discharge covered the specific debt that the creditor sought to collect.

This Court's decision in *McComb* is not to the contrary. The injunction in that case "enjoined any practices which were violations of [certain] statutory provisions" of the Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.*, while specifying that its scope was limited to provisions dealing with "minimum wages, overtime, and the keeping of records." 336 U.S. at 191-192. The Court observed that the decree violated in that case "provides the formula by which the amounts" that the defendants were required to pay "can be simply computed." *Id.* at 194. That characterization of the injunction suggests that the Court did not view the fact of

the defendants' non-compliance as subject to reasonable dispute. The Court also stated that the defendants had demonstrated a "proclivity for unlawful conduct" and "persistent contumacy" in committing "continuing and persistent violations of the Act," *id.* at 192, thereby finding not only a lack of objectively reasonable doubt about the injunction's scope but something akin to bad faith, which also has traditionally supported civil-contempt sanctions. See *Chambers* v. *Nasco, Inc.*, 501 U.S. 32, 50 (1991). The *McComb* Court's conclusion that the defendants there were in contempt thus does not suggest approval of petitioner's approach here, under which contempt sanctions can be based solely on a creditor's awareness that a discharge injunction existed and a court's ex post determination that the injunction was violated.

2. Petitioner's proposed rule also would produce impractical results. Petitioner argues (Br. 22 & n.11, 23 n.12; Pet. 28-29) that, in order to avoid the risk of being found in contempt, a creditor who is unsure about whether its claim is barred can seek a determination from the bankruptcy court before undertaking any collection action. Cf. *McComb*, 336 U.S. at 189. The existence of that alternative, however, provides no sound basis for the near-strict-liability approach that petitioner advocates for cases where the creditor elects to proceed in another forum instead.

The Bankruptcy Code identifies only three types of debts for which creditors are required to obtain an advance determination from the bankruptcy court that an exception to discharge applies before continuing collection efforts. See 11 U.S.C. 523(a)(2), (4), and (6). The other discharge exceptions are "self-executing," so that a creditor need not "obtain a judgment declaring the debt excepted from discharge" before seeking to collect.

In re Williams, 438 B.R. 679, 687 (B.A.P. 10th Cir. 2010); see *Tennessee Student Assistance Corp.* v. *Hood*, 541 U.S. 440, 450 (2004) (describing the discharge exception in Section 523(a)(8) as "self-executing") (citation omitted). The Code contemplates that any disputes about the applicability to particular debts of these self-executing exceptions typically will be litigated in the collection action itself. See 28 U.S.C. 1334(b); Fed. R. Civ. P. 8(c)(1) advisory committee's note (2010 Amendment) ("The issue whether a claim was excepted from discharge may be determined either in the court that entered the discharge or—in most instances—in another court with jurisdiction over the creditor's claim.").

The rule that petitioner advocates would create a strong incentive for creditors to seek advance judicial determinations from the bankruptcy court as to *all* claims they believe to be excepted from discharge, even when the exception at issue is self-executing under the terms of the Code. That approach would effectively override Congress's decision to require advance determination only under specified exceptions. It also would create undue delay and expense for all parties to the bankruptcy proceedings, and thereby thwart "a chief purpose of the bankruptcy laws": "'to secure a prompt and effectual administration and settlement of the estate of all bankrupts within a limited period.'" *Katchen* v. *Landy*, 382 U.S. 323, 328 (1966) (citation omitted). That is particularly true for government creditors, for whom it would be infeasible to institute adversary proceedings for each debt they attempt to collect from individual debtors, especially as the individual debts often are quite small.

Such delay also would unduly hinder a creditor's legitimate efforts to collect non-discharged debts. Under

petitioner's rule, a creditor could not safely pursue a collection action until all appeals over dischargeability have been exhausted. As this case illustrates, that process could take years. Indeed, the limitations period for a suit to collect the debt could expire before a final judicial determination of dischargeability, thereby extinguishing the creditor's rights altogether. Petitioner's proposed rule thus would be unfair to creditors and would upset the Bankruptcy Code's careful balancing of debtor and creditor rights.

Petitioner's proposed rule would create a further anomaly as well. As the damages award in this case illustrates, the principal economic harm a debtor is likely to suffer from a violation of the discharge injunction is the attorney's fees he will incur in contesting the creditor's efforts to collect the relevant debt. Cf. *Hutto* v. *Finney*, 437 U.S. 678, 691 (1978). Because respondents sought to litigate the dischargeability question in the state-court collection action, petitioner argues that he can recover his fees as a contempt sanction for respondents' purported violation of the discharge order. But if (as petitioner recommends) a creditor instead asks a bankruptcy court to render an advance determination that a particular debt is nondischargeable, and the debtor wishes to contest the point, the debtor is likely to incur substantially the same attorney's fees. And if the bankruptcy court finds that the debt has been discharged, the debtor generally will not be entitled to attorney's fees under the traditional "American Rule." See *Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421 U.S. 240, 247 (1975); cf. 11 U.S.C. 523(d) (requiring the creditor to pay the debtor's attorney's fees only if it unsuccessfully attempts to collect a debt under the

fraud exception to dischargeability in Section 523(a)(2), and only if its position is "not substantially justified").

Thus, if the Court adopted petitioner's proposed rule and future creditors responded by asking bankruptcy courts to render advance determinations as to the dischargeability of particular debts, debtors in petitioner's position still would suffer the same economic harm (attorney's fees incurred to litigate dischargeability) for which the contempt sanction in this case was intended to compensate. That regime would simply create an artificial incentive for creditors to litigate such issues in bankruptcy court rather than in other forums. Given Congress's decision to require advance determinations of dischargeability only with respect to three specified categories of debts (see pp. 26-27, *supra*), there is no reason to suppose that creation of such an incentive would further the purposes of the Bankruptcy Code.

D. The Court Should Vacate The Judgment Below And Remand The Case To Allow The Court Of Appeals To Apply The Correct Standard In The First Instance

The court of appeals held that respondents' "good faith belief" that their collection efforts were consistent with the discharge order, "even if unreasonable, insulated them from a finding of contempt." Pet. App. 13a. For the reasons set forth above, that holding was erroneous. In this as in other contexts where litigants request contempt sanctions for violations of injunctive orders, the propriety of such sanctions turns on whether there was an objective "fair ground of doubt" that the alleged contemnor's conduct was prohibited. The Court therefore should vacate the judgment below and remand the case so that the court of appeals can apply the correct standard.

Under that standard, and in light of the Ninth Circuit's prior decision in *In re Ybarra*, 424 F.3d 1018 (2005), cert. denied, 547 U.S. 1163 (2006), respondents may ultimately prevail by demonstrating an objectively fair ground of doubt about whether the discharge injunction prohibited their state-court collection efforts. In accordance with typical practice in Chapter 7 cases, the discharge order in petitioner's bankruptcy case stated that petitioner "shall be granted a discharge under § 727 of Title 11, United States Code," and it provided an "explanation of bankruptcy discharge in a Chapter 7 case" from Official Bankruptcy Form No. 18. 09-39216 Bankr. Ct. Doc. 15, at 1 (Feb. 23, 2010) (capitalization and emphasis omitted). The discharge order itself did not specify which of petitioner's debts was discharged.

The applicable statutory provisions likewise do not specifically address whether a discharge order like this one precludes efforts to collect the attorney's fees at issue here. Section 727 states that a discharge "discharges the debtor from all debts that arose before the date of the order for relief." 11 U.S.C. 727(b). Under *Ybarra*, attorney's fees incurred *after* the discharge order are not discharged if the debtor "return[s] to the fray" of litigation. 424 F.3d at 1026-1027; but see 11 U.S.C. 101(5)(A) (prepetition "claim" includes a "contingent" or "disputed" claim); 5 *Collier on Bankruptcy* ¶ 553.03[1][h][i], at 553-20 (16th ed. 2013) (attorney's fees incurred post-bankruptcy "in connection with * * * a prepetition claim" are themselves "prepetition in nature"). The first two courts to address the issue in this case (the state trial court and the bankruptcy court) held that petitioner had "returned to the fray," and that

the discharge injunction therefore did not prohibit respondents' attempts to collect post-discharge attorney's fees. Cf. *California Artificial Stone Paving*, 113 U.S. at 618 ("If the judges disagree there can be no judgment of contempt."). Objectively viewed, these circumstances may well lead the courts below to conclude that, at the time respondents initiated their collection efforts, there was at least a fair ground of doubt about whether the discharge injunction prohibited their actions. At a minimum, the bankruptcy court's imposition of punitive damages would seem to be in significant tension with the non-punitive purposes of civil contempt. See *Shillitani*, 384 U.S. at 369; *Gompers*, 221 U.S. at 441.

This Court has repeatedly emphasized, however, that it is a "court of review, not of first view." *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005); *United States* v. *Stitt*, 139 S. Ct. 399, 407 (2018) (citation omitted). Because none of the courts below applied the correct legal standard in determining whether respondents could be subjected to contempt sanctions for violating the discharge order, they should be given the first opportunity to apply that standard to the circumstances of this case.

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded for further proceedings.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
JOSEPH H. HUNT
Assistant Attorney General
MALCOLM L. STEWART
Deputy Solicitor General
SOPAN JOSHI
Assistant to the Solicitor General
MARK B. STERN
SARAH CARROLL
THOMAS J. CLARK
PAUL A. ALLULIS
Attorneys

FEBRUARY 2019

No. 18-489

In the Supreme Court of the United States

BRADLEY WESTON TAGGART,

Petitioner,

v.

SHELLEY A. LORENZEN, *et al.*,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE STATES OF CALIFORNIA, ALASKA, COLORADO, CONNECTICUT, FLORIDA, HAWAI'I, IDAHO, ILLINOIS, INDIANA, IOWA, KANSAS, MAINE, MARYLAND, MICHIGAN, MINNESOTA, NEBRASKA, NORTH DAKOTA, OHIO, OREGON, PENNSYLVANIA, SOUTH DAKOTA, TENNESSEE, UTAH, VERMONT, VIRGINIA, WASHINGTON, AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

XAVIER BECERRA
Attorney General of California
EDWARD C. DUMONT
Solicitor General
JANILL L. RICHARDS
Principal Deputy Sol. General
DIANE S. SHAW
Senior Assistant Atty. General

(Additional counsel listed on signature page)

MOLLY K. MOSLEY
Sup. Deputy Atty. General
ROBERT E. ASPERGER
CRAIG D. RUST
KARLI EISENBERG*
Deputy Attorneys General
STATE OF CALIFORNIA
DEPARTMENT OF JUSTICE
1300 I Street, Suite 125
Sacramento, CA 94244-2550
(916) 210-7913
Karli.Eisenberg@doj.ca.gov
**Counsel of Record*

March 28, 2019

QUESTION PRESENTED

Whether, under the Bankruptcy Code, a creditor's good-faith belief that the discharge injunction does not apply precludes a finding of civil contempt.

TABLE OF CONTENTS

Page

Interests of Amici States 1

Introduction and Summary of Argument 2

Argument 4

I. Whether an obligation has been discharged is often unclear and subject to reasonable dispute—particularly for the types of obligations owed to the government 4

II. A strict liability standard would improperly chill the use of state taxing and police powers and finds no support in the Bankruptcy Code 12

III. A standard of objective reasonableness accounts for the interests of both debtors and creditors, consistent with the Code 17

Conclusion 23

TABLE OF AUTHORITIES

Page

CASES

Bull v. United States
295 U.S. 247 (1935) 1

California Artificial Stone Paving Co. v. Molitor
113 U.S. 609 (1885) 20

First State Bank of Roscoe v. Stabler
914 F.3d 1129 (8th Cir. 2019) 21

Hawkins v. Franchise Tax Bd. of California
769 F.3d 662 (9th Cir. 2014) 10

In re Beback
2013 WL 5156706
(Bankr. M.D. Fla. Sept. 12, 2013) 15

In re Brewer
Adv. No. 19-01070-MER
(Bankr. D. Colo. 2019) 14

In re Brown
Adv. No. 17-3016
(Bankr. N.D. Ind. 2017) 10

In re Browne
358 B.R. 139 (Bankr. D. N.J. 2006) 11

In re Camilli
94 F.3d 1330 (9th Cir. 1996) 8

TABLE OF AUTHORITIES
(continued)

Page

In re Chateaugay Corp.
944 F.2d 997 (2d Cir. 1991) 11

In re Damm
2001 WL 34065016
(Bankr. C.D. Ill. 2001) 14

In re Ehrig
308 B.R. 542
(Bankr. N.D. Okla. 2004) 9

In re Hassanally
208 B.R. 46 (B.A.P. 9th Cir. 1997) 12

In re Hayes
2009 WL 8466788
(B.A.P. 1st Cir. Aug. 3, 2009) 9

In re Jensen
995 F.2d 925 (9th Cir. 1993) 11, 12, 14

In re Jones
657 F.3d 921 (9th Cir. 2011) 8

In re Kuhar
391 B.R. 733 (Bankr. E.D. Pa. 2008) 9

In re Marriage of Rossin
91 Cal. Rptr. 3d 427
(Cal. Ct. App. 2009) 6

In re Martin
542 B.R. 479 (B.A.P. 9th Cir. 2015) 9

TABLE OF AUTHORITIES
(continued)

Page

In re Robinson
228 B.R. 75 (Bankr. E.D.N.Y. 1998) 15

In re Saint Catherine Hosp. of Ind., LLC
800 F.3d 312 (7th Cir. 2015) 11

In re Schmiedel
236 B.R. 393 (E.D. Wis. 1999) 6

In re Watts
190 U.S. 1 (1903) 21

Latino Officers Ass'n City of New York, Inc. v. City of New York
558 F.3d 159 (2nd Cir. 2009) 20

Maness v. Meyers
419 U.S. 449 (1975) 21

NLRB v. Express Pub. Co.
312 U.S. 426 (1941) 20

Ohio v. Kovacs
469 U.S. 274 (1985) 5

Swift v. United States
196 U.S. 375 (1905) 20

United States v. Stanley
595 F. App'x 314 (5th Cir. 2014) 10

TABLE OF AUTHORITIES
(continued)

Page

Vertex Distrib., Inc. v. Falcon Foam Plastics, Inc.
689 F.2d 885 (9th Cir. 1982) 20, 21

Young v. United States
535 U.S. 43 (2002) 8

Statutes

11 U.S.C.
§ 101(5) 11
§ 507(a)(8)(A) 8
§ 507(a)(8)(E) 8
§ 523 ..... 5, 13, 19
§ 523(a)(1) 5, 8
§ 523(a)(1)-(19) 5, 16
§ 523(a)(1)(A) 8
§ 523(a)(1)(B) 8, 9
§ 523(a)(1)(C) 10
§ 523(a)(2) 16, 19
§ 523(a)(3)(B) 17
§ 523(a)(4) 5, 10, 16
§ 523(a)(5) 5, 10
§ 523(a)(6) 16
§ 523(a)(7) 5, 10
§ 523(a)(13) 5, 10
§ 523(a)(14A) 5, 10
§ 523(a)(19)(A)(i) 5, 10
§ 523(a)(19)(B)(iii) 5, 10
§ 523(c) 16
§ 523(d) 17, 19

TABLE OF AUTHORITIES
(continued)

Page

§ 524 19
§ 524(a)(2) 4
§ 541(a)(2) 6
§ 727(b) 5

28 U.S.C.
§ 1334(b) 17, 18

RULES

Federal Rules of Bankuptcy Procedure
Rule 4007 17
Rule 4007 original advisory committee notes 18
Rule 4007(a) 22
Rule 4007(b) 22
Rule 7001(6) 15
Rule 7007 15
Rule 7026 16
Rule 9011 22

Federal Rules of Civil Procedure
Rule 8 advisory committee's note
(2010 Amendment) 18

OTHER AUTHORITIES

Cal. Dep't of Tax & Fee Admin., Bankruptcy – Frequently Asked Questions (FAQs), https://www.cdtfa.ca.gov/legal/bankruptcy-faq.htm 10

TABLE OF AUTHORITIES
(continued)

Page

Cal. Dep't of Tax & Fee Admin., Compliance Policy & Proc. Manual § 740.150, https://www.cdtfa.ca.gov/taxes-and-fees/manuals/cpm-07.pdf;..... 10

Cal. Dep't of Toxic Substances Control, *2016 Programs and Accomplishments Report* (2017), https://www.dtsc.ca.gov/InformationResources/upload/DTSC-2016-Accomplishments-Report.pdf..... 14

Cal. Franchise Tax Board, *Do I Need to File?*, https://www.ftb.ca.gov/individuals/fileRtn/index.shtml?WT.mc_id=Forms_Sidebar_Completing_Requirement 9

Official Form 318, Order of Discharge, https://www.uscourts.gov/sites/default/files/form_b318_0.pdf..... 5

Robert E. Ginsberg et al., *Ginsberg & Martin on Bankruptcy* § 11.06[A] (5th ed. 2018)..... 16

TABLE OF AUTHORITIES
(continued)

Page

United States Courts, *Bankruptcy Cases Commenced, Terminated and Pending* (period ending Dec. 31, 2010), https://www.uscourts.gov/sites/default/files/statistics_import_dir/1210_f.pdf.. 7

United States Courts, *Bankruptcy Cases Commenced, Terminated and Pending* (period ending Dec. 31, 2018), https://www.uscourts.gov/sites/default/files/data_tables/bf_f_1231.2018.pdf 7

United States Courts, *Bankruptcy Court Miscellaneous Fee Schedule*, https://www.uscourts.gov/services-forms/fees/bankruptcy-court-miscellaneous-fee-schedule 15

United States Courts, *Table BAPCPA 1X – Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA)* (period ending Dec. 31, 2017), https://www.uscourts.gov/sites/default/files/data_tables/bapcpa_1x_1231.2017.pdf 7

INTERESTS OF AMICI STATES

States routinely interact with large numbers of individuals and businesses in carrying out their taxing and regulatory responsibilities. For example, States enforce injunctive orders, and they collect overdue permit and license fees, costs for clean up of contaminated sites, and income, sales, use, and property taxes from a wide variety of entities. Tax collection in particular is the "lifeblood of government[.]" *Bull v. United States*, 295 U.S. 247, 259 (1935).

The amici States have a significant interest in protecting their sovereign power to regulate and tax, consistent with legitimate constraints imposed by the Bankruptcy Code. Consistent with their strong interest in consumer protection, the States respect the important public purposes served by a bankruptcy discharge, which functions as an injunction against actions to collect debts within the scope of the discharge and thus provides debtors with a fresh start. At the same time, not all obligations are debts, and not all debts are discharged in bankruptcy. Debts expressly excepted from discharge include many tax obligations, a type of debt that is uniquely owed to governments. And in many cases, legal and factual complexities can lead to reasonable differences of opinion about whether a discharge applies to specific debts, or whether a particular obligation is even a debt at all.

It is of substantial importance to the States that bankruptcy courts apply the correct standard in determining whether a creditor's actions are subject to civil contempt sanctions for violation of a discharge. The standard should account for the interests of both debtors and creditors as reflected in the Bankruptcy Code. It should not chill or penalize States' reasonable post-

discharge regulatory and collection efforts, or effectively expand discharge protections beyond what the Code provides.

INTRODUCTION AND SUMMARY OF ARGUMENT

Whether a bankruptcy discharge applies to a particular obligation is not always clear. Among other things, the effect of certain statutory exceptions from discharge may depend on the application of complex law to disputed facts. Further, it may be unclear whether an obligation constitutes a claim relating to a debt under the Bankruptcy Code and, if so, whether the timing of that claim brings it within the scope of the discharge. Other circumstances, such as the effect of state community property laws, may further complicate matters.

The challenges facing creditors seeking to interpret and apply a discharge are particularly acute for States, whose taxing and regulatory responsibilities intersect with thousands of bankruptcies each year.[1] While States undertake reasonable efforts to comply with the terms of bankruptcy discharges, in many cases reasonable minds may differ about whether an obligation, including a debt, has been discharged. In some number of cases, reviewing courts will eventually hold that States have attempted to collect discharged debts.

---

[1] For ease of reference, the States in this brief use "creditor" broadly to include state regulatory agencies holding obligations that are not traditional claims for monies owed, such as those relating to cleanup of contaminated sites. In some instances, such obligations may be debts that may be discharged in bankruptcy. *See* discussion at p. 11, *infra*.

If, as petitioner argues, a strict liability standard applies to violation of bankruptcy discharges, the prospect of significant sanctions, including attorneys' fees, will unduly chill creditors in their efforts to collect debts and take other actions that Congress did not intend to be affected by a discharge. This result would be particularly troubling for States, impairing the exercise of core sovereign prerogatives related to matters such as tax collection and environmental protection.

Petitioner's proposed solution—requiring creditors to file actions in bankruptcy court seeking an advance determination of whether a specific obligation, has been discharged—is infeasible, particularly for States, and would cause States to write-off debts that, while not discharged, would not be cost-effective to collect given that additional expense. That result is not required by, or even consistent with, the Bankruptcy Code.

In contrast, a standard that protects creditors from contempt sanctions where their actions are *objectively reasonable* comports with the text and structure of the Code. Among other things, a standard of objective reasonableness: is consistent with Congress's decision to make only a few of the many exceptions from discharge subject to an express advance-determination requirement; respects the right of creditors to seek a determination with respect to discharge in state court, as part of state collection or enforcement actions; and is consistent with traditional civil contempt standards, as applied to technical court orders involving complicated law and facts. The objective reasonableness standard presents no obstacle to sanctioning predatory debt collection practices, or limits to liability for such practices. Such a standard properly protects both debtors' and creditors' interests under the Code.

In this case, respondents' view that attorneys' fees incurred post-bankruptcy were not discharged was objectively reasonable. Accordingly, the judgment below should be affirmed.

ARGUMENT

I. WHETHER AN OBLIGATION HAS BEEN DISCHARGED IS OFTEN UNCLEAR AND SUBJECT TO REASONABLE DISPUTE— PARTICULARLY FOR THE TYPES OF OBLIGATIONS OWED TO THE GOVERNMENT

Petitioner emphasizes the automatic, injunctive effect of a bankruptcy discharge—noting that it serves as a total prohibition on the collection of discharged debts and provides the debtor with a "fresh start." Pet. Br. 4; *see* 11 U.S.C. § 524(a)(2). But a discharge has that effect only for debts that are within its scope. By congressional design, not all obligations are debts, and not all debts are subject to discharge.

The language of a typical, summary discharge order is generally of little assistance in determining whether it prohibits collection of a particular debt. The two-page form Chapter 7 discharge order contains an "Explanation of Bankruptcy Discharge" that provides at the most general level that: "[c]reditors cannot collect discharged debts"; "[m]ost debts are discharged"; but "[s]ome debts are not discharged," including "debts for most taxes," "debts for most fines, penalties, forfeitures, or criminal restitution obligations," "debts that are domestic support obligations," "debts for most student loans," and "some debts which

the debtors did not properly list."[2] The form further states that "[t]his is only a general summary of the bankruptcy discharge . . . ."

Creditors seeking to determine whether a particular obligation has been discharged must interpret the applicable bankruptcy provisions and apply the law to the relevant facts. Section 523 of the Code sets out 19 exceptions from discharge, some of which are complex and conditional, and all but three of which are self-effectuating. 11 U.S.C. § 523(a)(1)-(19). Congress provided a number of discharge exceptions that apply to matters of critical, and in some cases unique, importance to government entities, including the States. These include taxes (§ 523(a)(1)); penalties (§ 523(a)(7), (a)(14A)); restitution (§ 523(a)(13), (a)(19)(B)(iii)); other sanctions imposed in criminal proceedings (§ 523(a)(4), (a)(7), (a)(13)); domestic support obligations (which may sometimes be owed to a government agency) (§ 523(a)(5)); and penalties imposed for violations of securities laws (§ 523(a)(19)(A)(i)). If an exception does not apply, a creditor must then evaluate whether the relief it seeks constitutes a "claim" under the Bankruptcy Code, and, if so, whether that claim "arose" before bankruptcy and therefore is discharged, or instead after bankruptcy, in which case the claim remains due. *Ohio v. Kovacs*, 469 U.S. 274, 278 (1985); 11 U.S.C. § 727(b).

State law may add an additional layer of legal complication. Community property law, for example, can create unpredictability about the scope of discharge

---

[2] Official Form 318, Order of Discharge, https://www.uscourts.gov/sites/default/files/form_b318_0.pdf.

orders, because creditors (including States) are authorized to pursue the separate property of a debtor's non-filing spouse. *See* 11 U.S.C. § 541(a)(2) (bankruptcy estate includes non-filing spouse's interest in community property, subject to additional conditions). Distinguishing between community property and separate property depends on complex standards set by state law as applied to particular factual circumstances. *See, e.g., In re Marriage of Rossin*, 91 Cal. Rptr. 3d 427, 431, 433 (Cal. Ct. App. 2009) (discussing various factors relevant to property characterization under California community property law and varying standards of appellate review); *see also In re Schmiedel*, 236 B.R. 393, 400 (E.D. Wis. 1999) (declining to award sanctions for creditor's alleged violation of discharge because "the complexities of the interplay between community property rules, state judgment lien statutes and bankruptcy law make [creditors'] hesitancy to release their rights understandable").

Disputes over the scope of discharge orders, including whether one of the exceptions applies, are thus often complex, and their ultimate resolution by the courts can be difficult to predict.[3] The challenges these circumstances present for those seeking to comply with discharge orders (and avoid contempt) are

---

[3] In this case, for example, two different judges (a state court judge and the bankruptcy judge, an expert in this field) determined that the creditors had not violated the terms of the debtor's discharge because the debtor had "returned to the fray." Pet. App. 6a-8a. According to petitioner, the creditors should nonetheless be held in contempt and liable for well over $100,000 because the reviewing court ultimately disagreed. Pet. Br. 6 n.1, 7.

magnified for States, given the large number of bankruptcy filings and the volume and diversity of States' potential claims. In recent years, the number of new bankruptcy petitions filed across the country has ranged from nearly 800,000 to over 1.5 million.[4] States and their agencies must assess their interests, if any, in each of these cases (assuming they receive notice). A larger State, for example, may have unpaid tax claims in tens of thousands of bankruptcy cases per year, making it infeasible to engage in detailed fact-finding and investigation.[5] Smaller States face proportionally similar challenges. And the amount of debt at issue is substantial: In 2017, individual debtors reported approximately $10 billion in non-dischargeable debt, or just under 10 percent of their total liabilities.[6] (As these figures are debtor-reported, the true amount of non-dischargeable debt may be even higher.)

---

[4] United States Courts, *Bankruptcy Cases Commenced, Terminated and Pending* (period ending Dec. 31, 2018), https://www.uscourts.gov/sites/default/files/data_tbles/bf_f_1231.2018.pdf; (period ending Dec. 31, 2010), https://www.uscourts.gov/sites/default/files/statistics_import_dir/1210_f.pdf.

[5] More than 68,000 bankruptcy cases were filed in California alone during 2018, and California state taxing authorities would have had claims in a significant percentage of those cases. *See* United States Courts, *Bankruptcy Cases Commenced, Terminated and Pending* (period ending Dec. 31, 2018), https://www.uscourts.gov/sites/default/files/data_tbles/bf_f_1231.2018.pdf.

[6] United States Courts, *Table BAPCPA 1X – Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA)* (period ending Dec. 31, 2017), https://www.uscourts.gov/sites/default/files/data_tables/bapcpa_1x_1231.2017.pdf (subtracting total liabilities from total Net Scheduled Debt).

As the examples below illustrate, States and state agencies often face significant challenges in determining whether obligations to governments fall within the scope of a discharge.

State taxing authorities regularly rely on several discharge exceptions that exclude certain state taxes and fees from discharge, thereby protecting the public fisc. *See* 11 U.S.C. § 523(a)(1). Some of the exceptions might appear to be relatively clear, such as the exception for income or excise taxes for which the debtor was required to file a return in the three years prior to the bankruptcy. 11 U.S.C. § 507(a)(8)(A), (E); *id.* § 523(a)(1)(A). But factual and legal disputes can and do occur even in this context. For example, state agencies must often determine whether an amount owed by a debtor is a tax that is nondischargeable, or instead a fee that is subject to discharge. *See, e.g., In re Camilli*, 94 F.3d 1330, 1331-1332 (9th Cir. 1996) (distinguishing between nondischargeable "excise taxes" and dischargeable "fees"). Additionally, state agencies must determine whether and for how long the three-year "look-back" period is tolled because of a bankruptcy stay. *See, e.g., In re Jones*, 657 F.3d 921, 923-924 (9th Cir. 2011); *Young v. United States*, 535 U.S. 43, 46 (2002).

Other tax-related discharge exceptions are also far from straightforward. One example is the exception from discharge for tax liabilities "with respect to which a return, or equivalent report or notice . . . was not filed or given." 11 U.S.C. § 523(a)(1)(B). In general, under state laws, an individual debtor need not file a personal tax return unless he or she receives a certain

minimum amount of income.[7] When no return is filed, States must make estimates about income earned and taxes due (if any) using the best information available, such as any forms submitted to the State showing payments to the debtor. *See, e.g., In re Hayes*, 2009 WL 8466788, at *1 (B.A.P. 1st Cir. Aug. 3, 2009) (State resorted to bank statements to determine whether debtor had a filing requirement where debtor failed to file returns); *In re Ehrig*, 308 B.R. 542, 550 (Bankr. N.D. Okla. 2004) (IRS had to "devote[] resources to gathering income information and filing a substitute for a return" where debtor had failed to file his own return).

Under a strict liability standard, application of this exception would regularly present a significant risk for States because, by definition, the exception operates where a State has imperfect information. While a state agency may believe, based on the available information, that the debtor had an income tax filing requirement, it may turn out that the debtor did not. *See, e.g. In re Hayes*, 2009 WL 8466788, at *1 (factual dispute over whether debtor had sufficient income to trigger filing requirement); *cf. In re Kuhar*, 391 B.R. 733, 736 (Bankr. E.D. Pa. 2008) (dispute over whether case should be dismissed as a result of debtor's failure to file return, where debtor contended she had no filing requirement). Questions also arise often as to what constitutes a "return" for purposes of § 523(a)(1)(B). *See, e.g., In re Martin*, 542 B.R. 479, 483-491 (B.A.P. 9th Cir. 2015).

---

[7] *See, e.g.*, Cal. Franchise Tax Board, *Do I Need to File?*, https://www.ftb.ca.gov/individuals/fileRtn/index.shtml?WT.mc_id=Forms_Sidebar_Completing_Requirement.

Another challenging exception applies to taxes "with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax." 11 U.S.C. § 523(a)(1)(C). The facts that the States rely on to demonstrate fraud will routinely be disputed, and it is impossible for a State to predict with certainty how a reviewing court will ultimately view the evidence. *See, e.g., United States v. Stanley*, 595 F. App'x 314, 318-319 (5th Cir. 2014) (whether debtor possesses "the requisite mental state" under § 523(a)(1)(C) requires an analysis of "the totality of the circumstances," which can include a detailed investigation of debtor's financial history); *Hawkins v. Franchise Tax Bd. of California*, 769 F.3d 662, 668-669 (9th Cir. 2014) (§ 523(a)(1)(C) requires specific intent to commit fraud).

Similar interpretive challenges affect a wide variety of other state agencies holding debts that may fall under an exception—such as child support obligations (§ 523(a)(5)), criminal restitution (§ 523(a)(13), (a)(19)(B)(iii)), penalties for violation of federal securities laws (§ 523(a)(19)(A)(i)), and penalties imposed for abuse of other persons (§ 523(a)(4), (a)(7), (a)(13), (a)(14A)).[8] And disputes over whether these exceptions apply frequently lead to litigation. *See, e.g., Indiana v. Brown (In re Brown)*, Adv. No. 17-3016

[8] Many state agencies—particularly those involved in taxation—have sophisticated procedures in place to analyze whether discharge exceptions apply, and to stop collections on liabilities that have been discharged. *See, e.g.*, Cal. Dep't of Tax & Fee Admin., Compliance Policy & Proc. Manual § 740.150, https://www.cdtfa.ca.gov/taxes-and-fees/manuals/cpm-07.pdf; Cal. Dep't of Tax & Fee Admin., Bankruptcy – Frequently Asked Questions (FAQs), https://www.cdtfa.ca.gov/legal/bankruptcy-faq.htm.

(Bankr. N.D. Ind. 2017) (dispute regarding whether penalty imposed for improperly receiving unemployment benefits is dischargeable).

Even determining whether an obligation owed to a government is a bankruptcy "claim," when that claim arose, and thus whether the claim is within the scope of a discharge can be difficult. 11 U.S.C. § 101(5) (defining "claim"); *cf. Ind. Family & Soc. Serv. Admin. v. Saint Catherine Hosp. of Ind., LLC*, (*In re Saint Catherine Hosp. of Ind., LLC*), 800 F.3d 312, 316-318 (7th Cir. 2015) (dispute over date on which State's claim relating to fee imposed on hospital arose). Determining claim status may be particularly complex in cases involving contaminated sites and environmental cleanup. *See, e.g., In re Chateaugay Corp.*, 944 F.2d 997 (2d Cir. 1991) (order seeking to remedy ongoing pollution not a claim). And questions about the relevant date of a claim are especially common in the environmental arena. *See, e.g., In re Jensen*, 995 F.2d 925 (9th Cir. 1993) (per curiam).[9] In many situations, a state environmental regulatory agency may be aware of potential contamination, and may have begun investigation and cleanup, making a precise determination of when the State's claim arose difficult. *See, e.g., id.* (explaining the variety of approaches used to discern when a claim for environmental response costs arose). Courts have declined to draw bright

---

[9] *See also, e.g., In re Browne*, 358 B.R. 139, 145 (Bankr. D. N.J. 2006) (declining to impose sanctions on motor vehicle agency for attempting to collect DUI surcharges for prepetition violations where agency relied on "ample precedent stating that the date of conviction was relevant to determining whether a claim arose prepetition and, thus, was discharged").

lines, and have described the intersection of environmental laws and the Bankruptcy Code as "somewhat messy," making "conflict and confusion . . . almost inevitable." *Id.* at 927-928. To further complicate matters, the test for determining whether a state environmental claim exists and when it arose varies among the circuits. *See, e.g., In re Hassanally*, 208 B.R. 46, 51 (B.A.P. 9th Cir. 1997) (discussing different tests applied in various jurisdictions).

Reasonable minds can and often do disagree on whether a particular obligation is a debt that has been discharged in bankruptcy. In those cases, no amount of due diligence can preclude the possibility that a court may later disagree with a State's reasonable and informed determination. Where a court does find a creditor's action to be in violation of a discharge, it always has the power to require compliance going forward, and to prevent collection of the debt. The question in this case is whether and in what circumstances the creditor can be held in contempt and subjected to sanctions.

II. A Strict Liability Standard Would Improperly Chill the Use of State Taxing and Police Powers and Finds No Support in the Bankruptcy Code

Holding creditors strictly liable for violating discharge orders, as petitioner advocates (*see* Pet. Br. 11, 15-16), would improperly interfere with States' core sovereign prerogatives to tax and regulate.

Under a strict liability regime, even where a State had a reasonable and well-supported position that an obligation was not discharged, the State would be sub-

ject to automatic sanctions for its actions if a court ultimately held to the contrary. Sanctions to compensate for attorneys' fees can range into the hundreds of thousands of dollars per case—as petitioner seeks here. Even a successful defense of a State's discharge determination can cost States a substantial amount in litigation costs and expenses. Under a strict liability rule, States would likely often find that the economic costs and risks of pursuing taxes and other legitimate debts, believed in good faith and with sound basis to be nondischarged, would greatly exceed the potential benefits. The precise cost of a strict-liability rule is difficult to estimate, but such a rule could certainly result in States writing off, in the aggregate, a substantial amount in obligations to the public fisc that Congress intended would remain collectable even after a bankruptcy discharge. *See generally* 11 U.S.C. § 523.

A strict liability standard would also chill enforcement by state environmental protection agencies. Where the status of an environmental obligation may be subject to dispute, and the State has knowledge of a discharge order involving a potentially responsible party, the issuance of a simple letter detailing that party's potential liability for environmental cleanup could trigger sanctions. The mere threat of a contempt action can be a serious deterrent to a state environmental agency, as any such action would divert its staff and resources away from its core mission.[10] *See,*

---

[10] The California Department of Toxic Substances Control, for example, is responsible for assessing fees on entities that generate, store, transport, or dispose of hazardous waste, and is responsible for overseeing investigation and cleanup at hundreds of different

e.g., *Brewer v. Ind. Dep't of Natural Res. (In Re Brewer)*, Adv. No. 19-01070-MER (Bankr. D. Colo. 2019) (owner of oil wells arguing that bankruptcy discharge invalidated entire settlement agreement with the Indiana Department of Revenue, including non-monetary obligations, such as agreement's requirement to plug wells). A strict liability rule would make it more expensive and risky for States to pursue non-discharged environmental cleanup obligations under federal and state environmental laws, and would result in polluters avoiding their fair share of the cleanup costs at these sites. This is not what Congress intended in enacting the Bankruptcy Code. *See Jensen*, 995 F.2d at 928 (observing that objectives of environmental cleanup laws and bankruptcy laws should be reconciled if possible); *see also In re Damm*, 2001 WL 34065016, at *3-4 (Bankr. C.D. Ill. (2001) (fines sought by state environmental agency are excepted from discharge not to deprive debtor of fresh start, but to "punish him for engaging in quasi-criminal conduct, to uphold the dignity and authority of the court, and to deter others from engaging in similar conduct").

A strict liability approach to contempt would also encourage debtors' attorneys to seek sanctions in a greater number of cases, even where a State's view that an obligation is not discharged is objectively rea-

---

sites. The Department's Brownfields Cleanup Program "oversees restoration of approximately 1,700 sites in California that are in different stages of investigation and cleanup. There are 98 sites in California on the federal National Priorities List (NPL), under the Superfund program." Cal. Dep't of Toxic Substances Control, *2016 Programs and Accomplishments Report*, p. 9 (2017), https://www.dtsc.ca.gov/InformationResources/upload/DTSC-2016-Accomplishments-Report.pdf.

sonable. Such a rule could encourage potentially responsible parties and their counsel to adopt sharp litigation tactics rather than working with government authorities to correct a problem. *See, e.g., In re Beback*, 2013 WL 5156706, at *3 (Bankr. M.D. Fla. Sept. 12, 2013) (refusing to award fees for violation of discharge order where doing so would encourage motions brought for sole purpose of obtaining fees); *In re Robinson*, 228 B.R. 75, 85 (Bankr. E.D.N.Y. 1998) (reducing fees awarded for violation of the automatic stay under § 362(h) for same reason).

Petitioner argues that any party holding an obligation that might be covered by discharge should first seek an advance determination on that issue from the bankruptcy court, rather than simply proceeding with collection or, where court intervention is necessary, directly filing an enforcement action in the normal forum. Pet. Br. 11. But that proposal would impose substantial costs and burdens—particularly on States, whose taxing and regulatory responsibilities intersect with a large volume of bankruptcies.[11] To obtain a pre-collection ruling addressing discharge from the bankruptcy court, a creditor must file an adversary proceeding in the bankruptcy case, which is essentially a new lawsuit, and pay a $350 filing fee. Fed. R. Bankr. P. 7001(6), 7007.[12] States filing such actions would be subject to discovery and associated costs.

---

[11] The proposal would, of course, substantially burden the bankruptcy courts with matters that are not currently litigated, or are litigated elsewhere, consistent with the Bankruptcy Code.

[12] United States Courts, *Bankruptcy Court Miscellaneous Fee Schedule*, https://www.uscourts.gov/services-forms/fees/bankruptcy-court-miscellaneous-fee-schedule.

Fed. R. Bankr. P. 7026. Where the debtor is not a resident of the State, the State would often be required to pay travel expenses and hire out-of-state counsel in addition to normal litigation costs. Requiring a State to proactively litigate every tax debt that might be subject to a discharge would require a disproportionate commitment of resources in relation to the potential recoveries. Again, States would likely write off a significant number of non-discharged tax debts simply because the amount involved in individual cases would not warrant the additional cost of litigation.[13] And such forced pre-determination litigation similarly would interfere with state environmental cost-recovery and enforcement actions.

Petitioner's advance-determination proposal is, moreover, contrary to Congress's decision to make 16 of the 19 discharge exceptions self-effectuating.[14] Only three discharge exceptions require an advance determination by the bankruptcy court to be effective. *See* 11 U.S.C. § 523(a)(1)-(19) (listing the exceptions); *id.* § 523(c) (requiring that three exceptions—§ 523(a)(2), (4), (6)—be asserted within a limited time after the case is filed or they are forfeited); *see also*

---

[13] While petitioner objects that "innocent debtors" emerging from bankruptcy should not have to "absorb the costs of creditor mistakes" (Pet. Br. 3), the Code contemplates that debtors will often have obligations that are not extinguished. The substantial costs to States that would result from petitioner's overbroad rule would fall to state taxpayers—a result that is neither just nor consistent with the Code.

[14] Congress has repeatedly added new exceptions to discharge, the first in 1984, with 10 more added since 1990. Robert E. Ginsberg et al., *Ginsberg & Martin on Bankruptcy* § 11.06[A] (5th ed. 2018).

Fed. R. Bankr. P. 4007.[15] While a creditor may elect to seek a discharge determination in bankruptcy court on self-effectuating exceptions, 11 U.S.C. § 523(d), nothing in the Code or the Rules requires that it do so. Indeed, as discussed below, other courts have concurrent jurisdiction to resolve discharge disputes as they arise—for example, in state-court enforcement actions. *See* 28 U.S.C. § 1334(b); *see also* p. 18, *infra*.

None of these adverse results serves the letter or spirit of the Code.

III. A Standard of Objective Reasonableness Accounts for the Interests of Both Debtors and Creditors, Consistent with the Code

The States agree with respondents and the United States that traditional standards for judging civil contempt should apply to asserted violations of a bankruptcy discharge. Specifically, where a creditor's view that an obligation is not covered by a discharge is "objectively reasonable," the creditor should not be held in contempt or subject to sanction where a court ultimately comes to a different conclusion. *See* Resp. Br. 34-36; U.S. Amicus Br. 20 ("[W]here there is an objectively reasonable dispute about whether a particular debt is discharged, . . . a creditor's attempt to collect *that debt* cannot subject it to civil contempt."); *see also id.* at 11, 23. The States offer the following additional arguments in support of that result.

---

[15] Even for these three exemptions, the advance-determination requirement is forfeited if the debtor fails to properly notify the creditor. *See* § 523(a)(3)(B).

1. The text and structure of the Bankruptcy Code support the use of an objective reasonableness standard. *See* generally Resp. Br. 16-18; U.S. Amicus Br. 23, 26. As noted above, such a standard properly accounts for Congress's decision to include 16 self-effectuating exceptions to the discharge injunction, and to require an advance determination by the bankruptcy court for only three exceptions. *See* pp. 5, 16, above.

A reasonableness standard also respects the statutory right of creditors to seek from a nonbankruptcy court a determination resolving whether a debt has been discharged—generally in the context of a state-court collection or enforcement action. Under 28 U.S.C. § 1334(b), district courts have "original *but not exclusive* jurisdiction of all civil proceedings arising under title 11," including discharge determinations. (emphasis added). State courts therefore have concurrent jurisdiction to determine whether there is or was a debt or other legal obligation and, if so, whether it has been discharged. As the advisory committee notes, "[t]he issue whether a claim was excepted from discharge may be determined either in the court that entered the discharge or—in most instances—in another court with jurisdiction over the creditor's claim." Fed. R. Civ. P. 8 advisory committee's note (2010 Amendment); *see also* Fed. R. Bankr. P. 4007 original advisory committee notes (jurisdiction over dischargeability of debts "is held concurrently by the bankruptcy court and any appropriate nonbankruptcy forum"); U.S. Amicus Br. 27. If a creditor proceeding in state court obtains a ruling that its claim or action is excepted from discharge, the creditor's subsequent actions to collect payment or enforce regulatory laws should be considered objectively reasonable as a matter of law.

In addition, a standard that would preclude sanctions where the creditor's actions are objectively reasonable is consistent with the Code's approach to fee awards. In only one instance does Congress allow debtors to seek compensation for responding to a creditor's requests for a discharge determination. Under Section 523(d), if a creditor "requests a determination of dischargeability" on a fraud-based complaint (that is, a complaint under the exception set out in Section 523(a)(2)), but the debtor prevails, the bankruptcy court shall award the debtor its costs and attorneys' fees only where the creditor's position was not "substantially justified"—in other words, where it was unreasonable.[16]

2. A standard of objective reasonableness also accounts for the difference between a summary discharge injunction, on the one hand, and a court order that specifies in detail the scope and nature of the conduct being enjoined. *See* generally U.S. Amicus Br. 18. As noted above (p. 4), the form discharge order is only two pages long, and operates by reference to the Bankruptcy Code. While Section 524 enjoins any attempt to collect on a "discharged" debt, it defines the scope of that injunction solely by cross-reference to the lengthy list of exceptions set out in Section 523. Determining whether one of those exceptions applies to a given claim or obligation can be a complex endeavor, as the applicable law is "complicated." JA 62; JA 60-62 (outlining numerous exceptions to the bankruptcy court's statutory injunction); *see also* pp. 4-12, *supra*.

---

[16] The section further provides that the court "shall not award such costs and fees if special circumstances would make the award unjust." *Id.* Congress did not extend the fee provision to the two other discharge exceptions that must be resolved in the bankruptcy court, or to any of the 16 self-effectuating exceptions.

In general, one may not be held in contempt of an injunction that is overly broad, or merely requires compliance with the law. *See generally NLRB v. Express Pub. Co.*, 312 U.S. 426, 435-436 (1941); *see also Swift v. United States*, 196 U.S. 375, 396 (1905) (Holmes, J.) ("We cannot issue a general injunction against all possible breaches of the law."). Bankruptcy discharges are of course not so broad as to be unenforceable, but their complicated, technical nature must affect how courts gauge contempt.

Cases addressing contempt in other areas involving technical orders and complicated law and facts may provide guidance. In such cases, courts regularly hold that a party's actions reflecting an objectively "reasonable interpretation" of the court's statutory discharge injunction do not result in contempt. *See, e.g., California Artificial Stone Paving Co. v. Molitor*, 113 U.S. 609, 618 (1885) ("contempt is a severe remedy, and should not be resorted to where there is fair ground of doubt as to the wrongfulness of the defendant's conduct"); *Vertex Distrib., Inc. v. Falcon Foam Plastics, Inc.*, 689 F.2d 885, 889 (9th Cir. 1982) (defendant not in contempt of consent judgment entered in trademark infringement suit where plaintiff failed to establish that defendant's interpretation was unreasonable); *Latino Officers Ass'n City of New York, Inc. v. City of New York*, 558 F.3d 159, 164 (2nd Cir. 2009) (applying "fair ground of doubt" standard to violation of order incorporating settlement agreement in employment discrimination case); *see* U.S. Amicus Br. 10. While a court might clarify its prior order and direct a party subject to the order to change its conduct in the future, it normally will not impose sanctions for past conduct that was taken reasonably and in good faith.

Further, amici States agree with respondents and the United States that, while a creditor's purely subjective good faith belief that a debt has not been discharged should not, standing alone, insulate it from contempt, the circumstances that give rise to the creditor's belief are relevant to whether it is objectively reasonable. Resp. Br. 23-27; U.S. Amicus Br. 11. Many cases discussing whether a party facing contempt acted in "good faith" may be interpreted as courts exploring the reasonableness of the defending party's actions. *See, e.g., Maness v. Meyers*, 419 U.S. 449, 465-466 (1975) (reversing contempt sanctions where alleged contemnor exercised "good faith" in refusing to produce court-ordered materials because they might tend to incriminate a witness in other proceedings); *In re Watts*, 190 U.S. 1, 29 (1903) (reversing contempt citation where contemnor acted in "good faith"); *Vertex*, 689 F.2d at 889; *First State Bank of Roscoe v. Stabler*, 914 F.3d 1129, 1140 (8th Cir. 2019) ("Sanctions generally should be unavailable where a creditor acts without knowledge of the injunction *or in good faith reliance on the belief that their actions are permissible.*" (emphasis added)). In other words, where a creditor makes a good faith effort to understand the relevant facts and law, the creditor's conclusion about whether an obligation is discharged is very likely to be objectively reasonable.

3. Finally, a standard protecting a creditor acting on an objectively reasonable basis does not offend the "fresh start" purpose of the Code. Debtors' interests remain amply protected.

If a debtor believes that a creditor is acting, or even threatening to act, in a way that violates a discharge injunction, the debtor may immediately invoke the bankruptcy court's authority to bar the creditor from

proceeding further, and may do so without payment of a filing fee. Fed. R. Bankr. P. 4007(a), (b). If the creditor has acted in bad faith, Rule 9011 allows the court to impose sanctions.

In short, the standard of objective reasonableness requires creditors to take appropriate steps to understand the relevant law and facts. That requirement protects debtors from creditor overreaching. At the same time, a reasonableness standard respects the legal limits of the discharge, allowing creditors to continue to collect debts that the discharge is not intended to cover. The standard thus gives full effect to both sides of the balance of interests struck by Congress in the Bankruptcy Code.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

XAVIER BECERRA
Attorney General of California
EDWARD C. DUMONT
Solicitor General
JANILL L. RICHARDS
Principal Deputy Solicitor General
DIANE S. SHAW
Senior Assistant Attorney General
MOLLY K. MOSLEY
Sup. Deputy Attorney General
ROBERT E. ASPERGER
CRAIG D. RUST
KARLI EISENBERG
Deputy Attorneys General

March 28, 2019

(Counsel listing continues on next page)

KEVIN G. CLARKSON
Attorney General
State of Alaska

PHIL WEISER
Attorney General
State of Colorado

WILLIAM TONG
Attorney General
State of Connecticut

KARL A. RACINE
Attorney General
District of Columbia

ASHLEY MOODY
Attorney General
State of Florida

CLARE E. CONNORS
Attorney General
State of Hawai'i

LAWRENCE G. WASDEN
Attorney General
State of Idaho

KWAME RAOUL
Attorney General
State of Illinois

CURTIS T. HILL, JR.
Attorney General
State of Indiana

TOM MILLER
Attorney General
State of Iowa

DEREK SCHMIDT
Attorney General
State of Kansas

AARON M. FREY
Attorney General
State of Maine

BRIAN E. FROSH
Attorney General
State of Maryland

DANA NESSEL
Attorney General
State of Michigan

KEITH ELLISON
Attorney General
State of Minnesota

DOUG PETERSON
Attorney General
State of Nebraska

WAYNE STENEHJEM
Attorney General
State of North Dakota

DAVE YOST
Attorney General
State of Ohio

ELLEN F. ROSENBLUM
Attorney General
State of Oregon

JOSH SHAPIRO
Attorney General
Commonwealth of
Pennsylvania

JASON RAVNSBORG
Attorney General
State of South Dakota

HERBERT H. SLATERY III
Attorney General
State of Tennessee

SEAN D. REYES
Attorney General
State of Utah

THOMAS J. DONOVAN, JR.
Attorney General
State of Vermont

MARK R. HERRING
Attorney General
Commonwealth of
Virginia

ROBERT W. FERGUSON
Attorney General
State of Washington

No. 18-489

IN THE

Supreme Court of the United States

BRADLEY WESTON TAGGART,

Petitioner,

v.

SHELLEY A. LORENZEN, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE NATIONAL CONSUMER BANKRUPTCY RIGHTS CENTER AND THE NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS AS AMICI CURIAE IN SUPPORT OF PETITIONER

TARA TWOMEY
Counsel of Record
MATTHEW J. MASON
NATIONAL CONSUMER BANKRUPTCY RIGHTS CENTER
1501 The Alameda, Suite 200
San Jose, CA 95126
(831) 229-0256
tara.twomey@comcast.net

Dated: February 26, 2019

BATEMAN & SLADE, INC BOSTON, MASSACHUSETTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

STATUTORY FRAMEWORK 4

ARGUMENT 6

I. *TAGGART* CREATES A BROAD EXCEPTION TO THE DISCHARGE INJUNCTION THAT RENDERS IT VIRTUALLY MEANINGLESS. 6

II. BASED ON THE *TAGGART* STANDARD, COURTS IN THE NINTH CIRCUIT HAVE CONSISTENTLY ABSOLVED CREDITORS OF LIABILITY FOR DISCHARGE VIOLATIONS BASED ON THEIR SELF-PROCLAIMED "GOOD FAITH." 8

III. THE *TAGGART* TEST REWARDS PURPOSEFUL IGNORANCE OF BANKRUPTCY LAW. 15

IV. CREDITORS' STATE OF MIND SHOULD BE IRRELEVANT WHEN DETERMINING COMPLIANCE WITH THE DISCHARGE INJUNCTION. 17

CONCLUSION 22

ADDENDUM - *Morning Star Company v. Benech (In re Benech)*, 17-CV-05100-LHK (N.D. Cal., July 25, 2018) 1

TABLE OF AUTHORTIES

CASES:

Banco Popular, North America v. Kanning,
638 Fed. Appx. 328 (5th Cir. 2016) 14, 22

Bessette v. Avco Fin. Servs.,
230 F.3d 439 (1st Cir. 2000) 6

Board of Trade v. Tucker,
221 Fed. 305, 137 C.C.A. 255 C.C.A. 2 18

Bradley v. Fina (In re Fina),
550 Fed. Appx. 150 (4th Cir. 2014) 14, 22

Bruce v. Fazilat, (In re Bruce),
2018 WL 3424581 (Bankr. N.D. Cal.
July 12, 2018) 9, 15, 16

Burlingham v. Crouse,
228 U.S. 459 (1913) 4

Donovan v. Mazzola,
716 F.2d 1226 (9th Cir. 1983) 20, 21

FTC v. Leshin,
618 F.3d 1221 (11th Cir. 2010) 20

Green Point Credit, LLC v. McLean (In re McLean),
794 F.3d 1313 (11th Cir. 2015) 4, 5

*Hardy v. United States ex rel. Internal
Revenue Service (In re Hardy)*,
97 F.3d 1384 (11th Cir. 1996) 5, 14, 22

Hodgson v. A-1 Ambulance Serv., Inc.,
455 F.2d 372 (8th Cir. 1972) 20

In re Cano,
410 B.R. 506 (Bankr. S.D. Tex. 2009).....6

In re Crystal Palace Gambling Hall, Inc.,
817 F.2d 1361 (9th Cir. 1987) 21

In re Lang,
398 B.R. 1 (Bankr. N.D. Iowa 2008) 7

In re McClure,
420 B.R. 655 (Bank. N.D. Tex. 2009).....7

In re Pratt,
462 F.3d 14 (1st Cir. 2006).....14, 22

In re Shaw,
2017 WL 2791663 (B.A.P. 9th Cir.
June 27, 2017) .....*passim*

In re Tardo,
145 B.R. 862 (E.D. La. 1992).....8

Lines v. Frederick,
400 U.S. 18 (1921) 4

Local Loan Co. v. Hunt,
292 U.S. 234 (1914) 4

Lorenzen v. Taggart (In re Taggart),
888 F.3d 438 (9th Cir. 2018) .....*passim*

Martin v. Trinity Indus., Inc.,
959 F.2d 45 (5th Cir. 1992) 20

McComb v. Jacksonville Paper Co.,
336 U.S. 187 (1949) ..... *passim*

McComb v. Norris,
177 F.2d 357 (4th Cir. 1949) 19

Morning Star Company v. Benech (In re Benech),
17-CV-05100-LHK (N.D. Cal.,
July 25, 2018) 10, 15, 16

NLRB v. Fairview Hosp.,
443 F.2d 1217 (7th Cir. 1971) 20

NLRB v. Trailways, Inc.,
729 F.2d 1013 (5th Cir. 1984) 19

Oil, Chem. & Atomic Workers Int'l Union v. NLRB,
547 F.2d 575 (D.C. Cir. 1976) 20

Parker v. Nelson (In re Nelson),
2016 WL 7321196 (B.A.P. 9th Cir.
Dec. 15, 2016) 12, 14, 15, 16

Proudfit Loose Leaf Co. v. Kalamazoo Loose Leaf Binder Co., 230 F. 120
(6th Cir. 1915) 17

Screw Mach. Tool Co. v. Slater Tool & Eng'g Corp.,
480 F.2d 1042 (6th Cir. 1973) 19

Star Fin. Servs. v. Aastar Mortg. Corp.,
89 F.3d 5 (1st Cir. 1996) 19

Sterling v. Southlake Nautilus Health & Racquet Club, Inc., 2018 WL 3660058 (N.D. Ind. Aug. 2, 2018) 7

Vuitton et Fils S.A. v. Carousel Handbags, 592 F.2d 126 (2d Cir. 1979) 19

Waste Conversion, Inc. v. Rollins Envtl. Servs. (NJ), Inc., 893 F.2d 605 (3d Cir. 1990) 19

STATUTES:

11 U.S.C. § 105(a) 6
11 U.S.C. § 523 ..... 4, 12
11 U.S.C. § 524 ..... 4, 5, 6
11 U.S.C. § 524(a) 4
11 U.S.C. § 524(a)(2) 6, 15, 17
11 U.S.C. § 524(c) 16
11 U.S.C. § 727(a), (c) 12
11 U.S.C. § 727 ..... 4, 5
11 U.S.C. § 1328 5
29 U.S.C.S. § 201 18

OTHER AUTHORITIES:

4 COLLIER ON BANKRUPTCY ¶ 524.LH(1) (Richard Levin and Henry J. Sommer eds., 16th ed.) 5, 8

Marianne B. Culhane and Michaela M. White, Debt After Discharge: An Empirical Study of Reaffirmation, 73 Am. Bankr. L.J. 709 (1999) 7

H.R. Rep. No. 2, at 365-66 (1977) 5

Official Bankruptcy Form 318 6

INTEREST OF AMICUS CURIAE[1]

The National Consumer Bankruptcy Rights Center (NCBRC) is a nonprofit organization dedicated to preserving the bankruptcy rights of consumer debtors and protecting the bankruptcy system's integrity. The Bankruptcy Code grants financially distressed debtors certain rights that are critical to the bankruptcy system's operation. Yet consumer debtors with limited financial resources and minimal exposure to that system are often ill-equipped to protect their rights in the appellate process. NCBRC files amicus curiae briefs in systemically-important cases to ensure that courts have a full understanding of the applicable bankruptcy law, the case, and its implications for consumer debtors.

The National Association of Consumer Bankruptcy Attorneys (NACBA) is a nonprofit organization of over 2000 consumer bankruptcy attorneys nationwide. NACBA has members practicing in all 50 states as well as Puerto Rico and the District of Colombia. As such NACBA and its members have a special interest in the uniformity of bankruptcy practice across the United States.

NCBRC, NACBA and its membership have a vital interest in the outcome of this case. Most debtors find it hard to afford bankruptcy, let alone

---

[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than NCBRC, NACBA, its members, and its counsel made any monetary contribution toward the preparation or submission of this brief Both Petitioner and Respondent have consented to the filing of this brief, and letters of consent accompany the brief

defend against the collection of discharged debts after bankruptcy. To avoid liability creditors have advanced a myriad of theories to justify post-discharge collection attempts. But efforts to collect on discharged debts strike at the heart of our bankruptcy laws and the fresh start those laws were designed to provide.

SUMMARY OF ARGUMENT

To effectuate bankruptcy's foundational fresh start principle, creditors need to understand and abide by the extensive scope of the Bankruptcy Code's discharge and discharge injunction. Creditors who attempt to collect on discharged debt should be held accountable for their conduct. Assessing whether creditors' conduct is subject to sanctions is best determined with a straightforward test that is focused on creditors' conduct, that is consistent with decades of civil contempt jurisprudence, and that does not take into account the creditors' subjective intent (or good faith). The majority of circuits use such a test. Simply put, the appropriate standard asks only whether the creditor: 1) had notice of the bankruptcy discharge, and 2) intended the conduct that violated the discharge injunction. The test contains no good faith exception.

In the decision below, the Ninth Circuit Court Appeals departed from well-established jurisprudence by injecting into the discharge violation analysis a determination of the creditor's subjective good faith belief, even if unreasonable. *Lorenzen v. Taggart* (*In re Taggart*), 888 F.3d 438 (9th Cir. 2018). The *Taggart* standard imposes significant costs on the bankruptcy system and on debtors, it undermines the efficacy of the bankruptcy

discharge, it chills debtors' efforts to protect their fresh start, and it rewards ignorance of the law. Because the *Taggart* analysis is a fact-based inquiry that implicates a party's subjective belief, even an unreasonable one, an evidentiary hearing is now required in every discharge violation case. For courts this means more time devoted to evidentiary hearings than would be necessary using an objective test. For debtors this means spending thousands, if not tens of thousands of dollars, protecting their discharge. Even assuming debtors have the financial ability to defend their discharge, the evidentiary burden to prove the creditor's lack of good faith by clear and convincing evidence is practically insurmountable.

Under *Taggart*, knowledge of bankruptcy law is discouraged. Lower courts applying the *Taggart* standard have excused obvious, and at times egregious, discharge violations because the creditor professed lack of knowledge with respect to the scope of the discharge or the discharge injunction. The *Taggart* framework encourages creditors to aggressively collect on discharged debt knowing sanctions can be avoided by claiming lack of knowledge or good faith.

This Court should reject *Taggart*'s good faith exception when analyzing discharge violations and should adopt the objective test used by the vast majority of courts. Under the objective test if the creditor has notice of the bankruptcy discharge and intends its conduct to collect discharged debt, the creditor is subject to sanction. Such a test is consistent with Congressional intent in creating the modern discharge injunction. It is also consistent with the standard for civil contempt outside of the

bankruptcy discharge context as set forth in *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949), and subsequent decisions in every circuit court of appeals, including the Ninth Circuit. Importantly, an objective test focused on the creditor's conduct preserves and protects the discharge that is the foundation of bankruptcy law.

STATUTORY FRAMEWORK

Bankruptcy law reflects a balancing act in which Congress has established the rules for adjusting debtor-creditor relationships. The two main purposes of bankruptcy are to provide a fresh start to the debtor and to facilitate the fair and orderly repayment of creditors to the extent possible. *See Burlingham v. Crouse*, 228 U.S. 459, 473 (1913).

One of the primary purposes of federal bankruptcy law is to "give the debtor a 'new opportunity in life and a clear field for future effort unhampered by the pressure and discouragement of pre-existing debt.'" *Lines v. Frederick*, 400 U.S. 18, 19 (1921) (quoting *Local Loan Co. v. Hunt*, 292 U.S. 234, 244-45 (1914). The discharge granted to the debtor and the discharge injunction imposed by 11 U.S.C. § 524(a) serve this purpose by first discharging the debtor from liability for most prepetition claims and second prohibiting "the commencement or continuation of an action, the employment of process, or an act, to collect, recover, or offset any [prepetition] debt as a personal liability of the debtor." *Green Point Credit, LLC v. McLean (In re McLean)*, 794 F.3d 1313, 1320 (11th Cir. 2015); *see* 11 U.S.C. §§ 523, 524, 727.

Legislative history demonstrates that the purpose of the modern discharge injunction is to

"eliminate any doubt concerning the effect of the discharge as a total prohibition on debt collection efforts." H.R. Rep. No. 2, at 365-66 (1977). The Bankruptcy Code's current statutory injunction is found in section 524. 11 U.S.C. § 524. This section is derived from section 14f of the former Bankruptcy Act. 4 COLLIER ON BANKRUPTCY ¶ 524.LH(1) (Richard Levin and Henry J. Sommer eds., 16th ed.). Prior to the enactment of section 14f, the "effect of the discharge was to create an affirmative defense that the debtor could plead in any action brought on the discharged debt." *Id.* The purpose of section 14f, as reflected in both the House Judiciary Committee Report and Senate Judiciary Committee Report, was to "effectuate, more fully, the discharge in bankruptcy by rendering it less subject to abuse by harassing creditors." *Id.*

To achieve the Bankruptcy Code's overall "fresh start" aim, the discharge injunction is viewed expansively and accounts for the myriad ways in which prepetition creditors might coerce debtors to pay an otherwise discharged debt. *Hardy v. United States ex rel. Internal Revenue Service (In re Hardy)*, 97 F.3d 1384, 1388-89 (11th Cir. 1996). In effect, the onus is on creditors to terminate all efforts to collect the discharged debt personally from the debtor. *See McLean*, 794 F.3d at 1321.

In practice, if the debtor satisfies the conditions of the Bankruptcy Code, the court grants the debtor a discharge, which relieves the debtor of personal liability for any discharged debt. *See* 11 U.S.C. §§ 727, 1328. The discharge order is a basic declaratory order, stating in its entirety, "IT IS ORDERED: A discharge under 11 U.S.C. . . . is granted to," followed by the name of the debtor, the

date, and the judge's signature. This simple discharge order is uniform across the country and is provided for in the mandatory, official forms. *See, e.g.*, Official Bankruptcy Form 318. The order explains that: "This order means that no one may make any attempt to collect a discharged debt from the debtors personally." *Id.*

Section 524 of the Bankruptcy Code further specifies the effects of that federal order. Section 524(a)(2) provides that: "A discharge in a case under this title . . . operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived." Thus, section 524 provides for injunctive relief to enforce the federal bankruptcy discharge.

Section 524 does not specify a remedy for a violation of the discharge injunction. However, the general consensus of bankruptcy and circuit courts around the country is that discharge violations may be remedied under section 105(a), which allows courts to issue any order necessary or appropriate to carry out the provisions of the Code. *See Bessette v. Avco Fin. Servs.*, 230 F.3d 439, 442 (1st Cir. 2000); *In re Cano*, 410 B.R. 506, 537-541 (Bankr. S.D. Tex. 2009).

ARGUMENT

I. *TAGGART* CREATES A BROAD EXCEPTION TO THE DISCHARGE INJUNCTION THAT RENDERS IT VIRTUALLY MEANINGLESS.

The decision below holds that a creditor does not violate the discharge injunction if the creditor had a good faith belief, even if unreasonable, that

the injunction does not apply to its claim. *Lorenzen v. Taggart (In re Taggart)*, 888 F.3d 438, 444 (9th Cir. 2018). Under *Taggart*, to establish a discharge violation, the debtor must show by clear and convincing evidence that the creditor was aware of the discharge injunction and aware that it applied to the creditor's claim. But, whether the party is aware that the discharge injunction is applicable to its claim is a fact-based inquiry which implicates the party's subjective belief, even an unreasonable one. The *Taggart* test thus turns on the subjective motivation and not the objective conduct of the creditor. A creditor's subjective intent may provide a complete defense to a discharge violation. *See Taggart*, 888 F.3d at 444.

Creditors have a myriad of theories, which are, at best, "superficially rationalized schemes intended and actually work to extort payment of a discharged debt." *In re Lang*, 398 B.R. 1, 4 (Bankr. N.D. Iowa 2008). For example, there is a long history of creditors seeking to collect on discharged debts through improper reaffirmation agreements. Marianne B. Culhane and Michaela M. White, *Debt After Discharge: An Empirical Study of Reaffirmation*, 73 Am. Bankr. L.J. 709, 717 (1999) (discussing "rogue" reaffirmation agreements). Creditors have attempted to shield themselves from liability by referring debtors' discharged accounts to collection agents, *see In re McClure*, 420 B.R. 655 (Bank. N.D. Tex. 2009), or have refused to withdraw pending litigation to collect a debt resulting in debtor's post-discharge incarceration. *See Sterling v. Southlake Nautilus Health & Racquet Club, Inc.*, 2018 WL 3660058 (N.D. Ind. Aug. 2, 2018). And, sometimes creditors employ creative legal theories in

an attempt to circumvent the prohibition on collecting discharged debt. *See, e.g., In re Shaw*, 2017 WL 2791663 (B.A.P. 9th Cir. June 27, 2017) (attempting to use "successor liability" theory to collect a discharged debt); *In re Tardo*, 145 B.R. 862 (E.D. La. 1992) (creditor's attorney attempting to collect attorney fees from the debtor that he would have received under contingent fee agreement with creditor arguing that the fee represented a separate debt that had not been scheduled by the debtor and therefore was not discharged).

Under *Taggart*, creditors now have a free pass to ignore the discharge injunction, engage in collection activity on discharged debt, and force debtors to later disprove the creditors' good faith. Given that creditors can assert their subjective intent as a complete defense to a discharge violation, articulation of any scheme or belief allows creditors to proceed without risk of sanctions. Rather than subjecting debtors to less abuse by harassing creditors, as Congress intended, in the Ninth Circuit the Bankruptcy Code's discharge order and statutory discharge injunction have become practically meaningless. *See* 4 COLLIER ON BANKRUPTCY ¶ 524.LH(1).

II. BASED ON THE *TAGGART* STANDARD, COURTS IN THE NINTH CIRCUIT HAVE CONSISTENTLY ABSOLVED CREDITORS OF LIABILITY FOR DISCHARGE VIOLATIONS BASED ON THEIR SELF-PROCLAIMED "GOOD FAITH."

In *Taggart*, the court held that as a matter of law that creditor's subjective belief that the discharge did not apply to its claim was sufficient to

absolve it of liability for violation of the discharge injunction. Ninth Circuit courts have hewed closely to that mandate, consistently denying sanctions, where creditors raised their subjective intent as a defense to liability. Four examples stand out.

In *Bruce v. Fazilat, (In re Bruce)*, 2018 WL 3424581 (Bankr. N.D. Cal. July 12, 2018), the bankruptcy court refused to order sanctions despite finding a discharge injunction violation because of creditor counsel's mistake of law. *Id.* at *5. In *Bruce* the creditor sought to evict the debtor from rental housing by bringing an unlawful detainer action. *Id.* at *1-2. Before the case came to trial the debtor filed for Chapter 7 bankruptcy. The creditor was listed on the schedules. While the bankruptcy was pending, the creditor cut the lock off of the electrical box, turned the power off and put a new lock on the box. Shortly thereafter, the creditor tried to break into the house to collect the money owed. Then the creditor's daughter contacted the debtor's employer, purportedly to ask for the debtor's address so he could be sued. Within a week of the contact the debtor was told to resign his employment or be fired. He resigned.

After the discharge, the unlawful detainer trial was held in state court, and the creditor obtained a personal judgment against the debtor for over $13,000.00 for rent and costs. *Id.* at *3. Later, the bankruptcy court found that the state court judgment imposed personal liability on the debtor for a lease that had been rejected in the bankruptcy, and therefore discharged. The state court judgment was declared to be void.

The court declined, however, to award sanctions against the creditor for obtaining a personal judgment against the debtor on a discharged debt. Citing to *Taggart's* unreasonable good faith belief standard, the court accepted the creditor attorney's defense that he believed he had a right to sue for damages and attorney fees, despite the bankruptcy discharge. "Here, there is no doubt that [creditor's attorney] had a good faith belief that he was properly bringing an action in the state court for holdover damages and attorney's fees." *Id.* at *5. The court vacated the state court judgment but found no contempt. The debtor was left to bear the costs of removing the judgment obtained in violation of the discharge injunction.

In *Morning Star Company v. Benech (In re Benech)*, 17-CV-05100-LHK (N.D. Cal., Order Vacating Order of Bankruptcy Court, July 25, 2018) (Addendum A), the district court reversed a bankruptcy court's contempt finding based on creditor's counsel "mistake of law." In 2009, Benech, the debtor, signed a promissory note secured by a deed of trust on his San Francisco property. In October 2013, Benech filed Chapter 7 bankruptcy and received his discharge in March 2014, which eliminated his personal liability on the note. In 2015, Benech executed an agreement that purportedly reaffirmed his obligation to pay the creditor the full amount of his already discharged promissory note plus interest. The property was subsequently foreclosed, and the creditor sued the debtor in state court for the deficiency between the amount owed on the note and sale proceeds.

Benech's attorney informed the creditor that the underlying debt had been discharged in

bankruptcy and not reaffirmed in the manner required by the Bankruptcy Code. When the creditor continued to pursue the debtor, Benech filed a motion for contempt in the bankruptcy court. At the hearing, counsel for the creditor revealed that he did not understand the basis for the contempt motion. The bankruptcy court explained that the act of trying to collect on the discharged debt violated the discharge absent a proper reaffirmation agreement. The court found the creditor in contempt and awarded Benech $19,247.74 in attorney fees and costs.

On appeal the creditor asserted that Benech did not prove by clear and convincing evidence that the creditor knew the discharge applied to its claim, because creditor's counsel believed there was no violation for entering into an improper postpetition reaffirmation agreement and then enforcing it. The district court agreed and remanded the case to the bankruptcy court for an evidentiary hearing to determine if the creditor knew the discharge applied to its claim, keeping in mind that a good faith belief, even if unreasonable, would insulate the creditor from sanctions.

In *In re Shaw*, 2017 WL 2791663 (B.A.P. 9th Cir. June 27, 2017), the Ninth Circuit Bankruptcy Appellate Panel (BAP) similarly reversed the bankruptcy court because the debtor did not prove that the creditor knew that its postpetition efforts to collect a prepetition debt violated the discharge injunction. In *Shaw* the creditor, Rogerson, sued the debtor Shaw in state court seeking to recover over $350,000 owed on a promissory note. *Id.* at *1. Shortly thereafter, Shaw filed Chapter 7 bankruptcy. Rogerson was listed both as a secured and unsecured

creditor. Rogerson did not object to the debtor's discharge or seek a determination that debts owed to her were nondischargeable. 11 U.S.C. § 523 (listing debts that are nondischargeable); 11 U.S.C. § 727(a), (c) (relating to denials of discharge). Shaw received his bankruptcy discharge, and Rogerson admitted receiving notice of the discharge.

Later, Rogerson amended her state court claim. *Id.* at *2. Her new claim alleged that Shaw remained personally liable on the discharged debt as the successor in interest to an LLC previously formed and then dissolved by Shaw. That is, Rogerson sought to hold Shaw personally liable for the discharged debt in state court under a different theory of liability.

Shaw filed a motion in bankruptcy court to enforce his discharge. *Id.* at 3. The bankruptcy court rejected Rogerson's defenses and found that she had willfully violated the discharge injunction. According to the bankruptcy court, the state court claims were merely an artifice to reimpose individual liability on Shaw for discharged debts. The court awarded Shaw attorney fees and costs of $34,821.00.

The BAP reversed and remanded the case because the bankruptcy court had not conducted an evidentiary hearing. *Id.* at *6. Furthermore, according to the BAP, based on the appellate record Shaw had not proven that Rogerson subjectively knew that the legal theories of recovery she asserted violated the discharge injunction. *Id.*

In *Parker v. Nelson (In re Nelson)*, 2016 WL 7321196 (B.A.P. 9th Cir. Dec. 15, 2016), the BAP reversed the bankruptcy court's order holding the debtor's former attorney, Parker, in contempt for

violating the discharge injunction. Parker represented the debtor with respect to prepetition accident claims. He was terminated from representing the debtor, and he was listed as a creditor on the bankruptcy petition and mailing matrix at the correct address. Nevertheless, Parker continued to assert amounts were owed after the debtor received her discharge. On two occasions the debtor's current attorney sent letters to Parker putting him on notice that the further attempts to collect the debt violated the discharge injunction. Parker never responded to the two letters and debtor's attorney filed a motion for contempt. The motion was granted and the debtor was awarded attorney fees and costs in the amount of $2,049.00. No evidentiary hearing was held.

On appeal the BAP reversed the bankruptcy court order and remanded the case for an evidentiary hearing. A second hearing was held and once again Parker was found in contempt. The bankruptcy court found that Parker had actual knowledge of the discharge injunction in 2013 and still attempted to collect the debt in violation of the discharge injunction for two years thereafter. The bankruptcy court awarded the debtor costs and attorney fees in the amount of $17,887.50.

On appeal for a second time, the BAP once again reversed the bankruptcy court. On review the BAP found that Parker's assertion that he did not know that the discharge injunction applied to his claims provided him a complete defense to contempt under the *Taggart* standard. As the dissent remarked "Parker avoids a finding of contempt simply by testifying (credibly) that he did not subjectively believe that the discharge applied to his

attorney fee claims, no matter how misguided or unreasonable his belief might have been." *Nelson*, 2016 WL 7321196 at *11.

In *Taggart* and each of the cases cited above, the debtor proved that the debtor filed bankruptcy, the creditor's debt was listed in the bankruptcy schedules, the debtor received a discharge, the creditor received notice of the discharge, and that the creditor then continued attempts to collect the discharged debt personally from the debtor. Under the majority approach that proof is sufficient for the court to find the creditor violated the discharge injunction. *See Hardy*, 97 F.3d at 1390; *see also In re Pratt*, 462 F.3d 14, 20-21 (1st Cir. 2006) (creditor's good faith not a defense to discharge violations); *Banco Popular, North America v. Kanning*, 638 Fed. Appx. 328, 342 (5th Cir. 2016) (describing test for evaluating discharge violation and citing *Hardy*); *Bradley v. Fina* (*In re Fina*), 550 Fed. Appx. 150, 145-55 (4th Cir. 2014) (citing *Hardy* and concluding subjective belief or intent not relevant to inquiry). The *Taggart* decision now gives these creditors a free pass.

Further, the Ninth Circuit does not explain how a debtor disproves the creditor's subjective intent. The fact that a debtor notifies the creditor in writing why the discharge injunction applies has not been sufficient. And no amount of objective proof appears to suffice if the creditor asserts a good faith, but unreasonable, belief that its conduct was not prohibited by the discharge injunction.

III. THE *TAGGART* TEST REWARDS PURPOSEFUL IGNORANCE OF BANKRUPTCY LAW.

In the cases above, the creditor's conduct was purportedly based on a mistaken understanding of bankruptcy law, the discharge, and the discharge injunction.

In *Bruce*, the creditor obtained a judgment against the debtor personally based on a prepetition lease that had been rejected in the bankruptcy and therefore discharged. 2018 WL 424581 (Bankr. N.D. Cal. July 12, 2018). The postpetition judgment that the creditor obtained violated the discharge injunction. However, creditor's counsel credibly testified that he did not know his conduct violated the injunction. The debtor had to bear the cost of resorting to the bankruptcy court to avoid the $16,216.56 judgment obtained against him. In *Nelson*, the creditor, an attorney, claimed he did not know that his debt for prepetition legal services was discharged in bankruptcy. *Nelson*, 2016 WL 7321196 (B.A.P. 9th Cir. Dec. 15, 2016). In *Shaw*, the creditor knew the debt was discharged. 2017 WL 2791663 (B.A.P. 9th Cir. June 27, 2017). However, the creditor claimed that pursuing the debtor under a different theory of liability would justify attempts to collect the discharged debt. The bankruptcy court found that the state court claims were merely an artifice to reimpose individual liability on Shaw for discharged debts in violation of section 524(a)(2). And, in *Benech*, the creditor sued the debtor on an unenforceable reaffirmation agreement. The creditor was absolved of liability because the creditor argued that it did not know the agreement was unenforceable even though the agreement met none

of the requirements for reaffirmation agreements under the Bankruptcy Code. *Benech*, 17-CV-05100-LHK (N.D. Cal., Order Vacating Order of Bankruptcy Court, July 25, 2018) (Addendum A); *see* 11 U.S.C. § 524(c) (providing comprehensive requirements for reaffirmation agreements).

In each of these cases the cost to defend the debtor's bankruptcy discharge was significant. In *Nelson* the debtor incurred over $17,000.00 in attorney fees and costs and litigated two successful motions for contempt only to have the cases reversed based on the creditor's subjective belief that his underlying claim for attorney fees was not discharged in the bankruptcy. 2016 WL 7321196, at *4. In *Shaw* the debtor incurred over $33,000.00 in attorney fees to defend his discharge. 2017 WL 2791663, at *1. In *Bruce* the debtor expended an unknown amount of fees to obtain a bankruptcy court ruling that a $17,000.00 postpetition judgment was void. In *Benech* the debtor incurred over $19,000.00 in attorney fees and costs to defend against a state court suit brought on a discharged debt. *Benech*, 17-CV-05100-LHK (N.D. Cal., Order Vacating Order of Bankruptcy Court, July 25, 2018) (Addendum A).

None of these cases are particularly complicated. Yet, in each case, creditors professed ignorance of the law at significant cost to the debtors. Most debtors do not have the resources to defend such conduct by creditors. This Court in *McComb* expressed it well. Where "the aim is remedial and not punitive", the "burden of any uncertainty" is on "respondents' shoulders". *McComb*, 336 U.S. at 193. Instead, the decision

below shifts the cost of preserving the fresh start to the debtor.

IV. CREDITORS' STATE OF MIND SHOULD BE IRRELEVANT WHEN DETERMINING COMPLIANCE WITH THE DISCHARGE INJUNCTION.

The discharge injunction is a statutory injunction that arises directly from the text of the Bankruptcy Code. 11 U.S.C. § 524(a)(2). When a court is called upon to enforce the statutory discharge injunction, pursuant to section 105, the standard applied should not be less rigorous than that used in other civil contempt contexts. In the typical civil contempt analysis, every circuit court of appeals, including the Ninth Circuit, has followed the principles established by this Court in *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191, 69 S. Ct. 497, 499 (1949). Under the *McComb* standard the state of mind of the contemnor is irrelevant.

As early as 1915, the Sixth Circuit rejected the idea that "good faith" could be a defense to civil contempt. In *Proudfit Loose Leaf Co. v. Kalamazoo Loose Leaf Binder Co.*, the Sixth Circuit upheld civil contempt, remedial sanctions for violation of a previous patent infringement injunction. 230 F. 120, 132 (6th Cir. 1915). On appeal, defendants claimed that they had acted in "good faith" on counsel's advice that a slight change to its product design would prevent infringement on the plaintiff's patent. The Court rejected that defense as to the damages awarded to the plaintiff:

> True, [defendants] were advised by counsel that the removal of the cover flap avoided infringement; but advice of

> counsel and good-faith conduct do not relieve from liability for a civil contempt, although they may affect the extent of the penalty. It is clear that the order, so far as it adjudged compensation to [plaintiff] here, was amply justified. *Board of Trade v. Tucker* (C.C.A. 2) 221 Fed. 305, 307, 137 C.C.A. 255.

Over 30 years later, the same issue came before this Court in *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 69 S. Ct. 497 (1949). *McComb* involved a decree enjoining Jacksonville Paper from violating the Fair Labor Standards Act, 29 U.S.C.S. § 201 ("FLSA"), in enumerated ways. *Id.* at 189. Subsequently, McComb, the Administrator of the Wage and Hour Division of the U.S. Department of Labor, instituted a contempt proceeding alleging that Jacksonville Paper failed to comply with the minimum wage, overtime, and record keeping provisions of the injunction. *Id.* While the trial court held that Jacksonville Paper engaged in numerous improper practices, it nevertheless held that there was no "willful" violation of any "specific" provision of the injunction. *Id.* at 190. The Fifth Circuit affirmed.

On review, this Court reversed, holding that the "absence of willfulness" is not a defense to civil contempt:

> Since the purpose is remedial, it matters not with what intent the defendant did the prohibited act. The decree was not fashioned so as to grant or withhold its benefits dependent on

> the state of mind of respondents. It laid on them a duty to obey specified provisions of the statute. An act does not cease to be a violation of a law and of a decree merely because it may have been done innocently.

Id. at 191.

McComb has since been adopted or applied in every circuit court of appeals in a wide variety of civil contempt contexts. *See, e.g., Star Fin. Servs. v. Aastar Mortg. Corp.*, 89 F.3d 5, 10 (1st Cir. 1996) ("good faith," the "absence of willfulness," or "doing an act innocently" does not relieve a party of contempt in the face of a clear order; trademark infringement); *Vuitton et Fils S.A. v. Carousel Handbags*, 592 F.2d 126, 128 (2d Cir. 1979) (because civil contempt is remedial in nature, the fact that the prohibited act was done inadvertently or in good faith does not preclude a citation for civil contempt; sale of counterfeit handbags); *Waste Conversion, Inc.* v. *Rollins Envtl. Servs. (NJ), Inc.*, 893 F.2d 605, 609 (3d Cir. 1990) ("Good faith" is not a defense to civil contempt; "willfulness" distinguishes criminal contempt from civil contempt); *McComb v. Norris*, 177 F.2d 357, 358-60 (4th Cir. 1949) (enforcement of injunction in civil remedial contempt for violation of FLSA does not depend on defendant's state of mind); *NLRB v. Trailways, Inc.*, 729 F.2d 1013, 1016 (5th Cir. 1984) (absence of willfulness is irrelevant in civil contempt; the only issue was actual compliance with this court orders); *Screw Mach. Tool Co. v. Slater Tool & Eng'g Corp.*, 480 F.2d 1042, 1044 (6th Cir. 1973) (in civil, remedial contempt neither the "frequency of the violations" nor the "good intentions of the violator" are material; unfair trade practices);

NLRB v. Fairview Hosp., 443 F.2d 1217, 1220 (7th Cir. 1971) ("good faith" does not justify failing to obey a court order enjoining violations of the NLRA); *Hodgson v. A-1 Ambulance Serv., Inc.*, 455 F.2d 372, 374 (8th Cir. 1972) ("willfulness" or "lack of willfulness" had "nothing to do with the question of civil contempt for noncompliance with the injunction"; FLSA); *Donovan v. Mazzola*, 716 F.2d 1226, 1228 (9th Cir. 1983) (intent is not an issue in civil contempt proceedings; ERISA); *FTC v. Leshin*, 618 F.3d 1221, 1232-33 (11th Cir. 2010) ("The decisions of our Court and our predecessor court have held that substantial, diligent, or good faith efforts are not enough; the only issue is compliance."); *Oil, Chem. & Atomic Workers Int'l Union v. NLRB*, 547 F.2d 575, 581 (D.C. Cir. 1976)("good faith or lack of willfulness" is not a defense to civil contempt; NLRA).

The circuit courts of appeals are in general agreement as to the elements of civil contempt. The Fifth Circuit has the most straightforward recitation of the elements: "A movant in a civil contempt proceeding bears the burden of establishing by clear and convincing evidence (1) that a court order was in effect, (2) that the order required certain conduct by the respondent, and (3) that the respondent failed to comply with the court's order." *Martin v. Trinity Indus., Inc.*, 959 F.2d 45, 47 (5th Cir. 1992).

Even the Ninth Circuit, except in *Taggart*, has adhered to these basic elements of civil contempt in both bankruptcy and non-bankruptcy cases. For example, in *Donovan v. Mazzola*, the Ninth Circuit Court of Appeals upheld a finding of contempt in an ERISA case where the appellants failed to comply with a district court order requiring them to post a

bond by a certain date. 716 F.2d at 1228. The court rejected the appellants' assertions of good faith noting that "[i]ntent is not an issue in civil contempt proceedings." *Id.* at 1240. Similarly, in *In re Crystal Palace Gambling Hall, Inc.*, a chapter 11 bankruptcy case, the Ninth Circuit also applied the *McComb* standard. 817 F.2d 1361 (9th Cir. 1987). There, the chapter 11 debtor failed to timely sell casino assets to a designated purchaser as required by a bankruptcy court order. *Id.* at 1362. In affirming a finding of contempt against the debtor, the court stated that "[i]t does not matter what the intent of the appellants was when they disobeyed the court's order." *Id.* at 1365. The court continued that the "proposed 'good faith' exception to the requirement of obedience to a court order has no basis in law, and we reject the invitation to create such an exception." *Id.*

In *Taggart*, the Ninth Circuit announced a standard for evaluating creditor's conduct relative to the discharge injunction that contradicts decades of civil contempt jurisprudence. Under that standard, a creditor cannot be sanctioned for violating the discharge order or statutory discharge injunction if the creditor had a good faith belief, even if unreasonable, that the discharge was inapplicable to its claim. In the decision below, the Ninth Circuit deviated from well-established civil contempt principles. There is no good faith exception to a violation of the discharge injunction.

CONCLUSION

The appropriate standard for determining a discharge violation is whether the creditor: 1) had notice of the bankruptcy discharge, and 2) intended the conduct that violated the injunction. *See Hardy*, 97 F.3d at 1390. The proper analysis focuses on the creditors' conduct and contains no good faith exception. *Id.*; *see also In re Pratt*, 462 F.3d 14, 20-21 (1st Cir. 2006) (creditor's good faith not a defense to discharge violations); *Banco Popular, North America v. Kanning*, 638 Fed. Appx. 328, 342 (5th Cir. 2016) (describing test for evaluating discharge violation and citing *Hardy*); *Bradley v. Fina* (*In re Fina*), 550 Fed. Appx. 150, 145-55 (4th Cir. 2014) (citing *Hardy* and concluding subjective belief or intent not relevant to inquiry). Under this standard discharge violations are easy to ascertain and capable of objective proof. It appropriately requires creditors to take responsibility for their own conduct with respect to discharged debt; *Taggart* excuses creditors from that same responsibility.

Amici NCBRC and NACBA respectfully submit that this Court should reverse the decision below and hold that the creditor's subjective intent, or "good faith," is not relevant when evaluating whether a creditor violated the Bankruptcy Code's statutory discharge injunction.

Respectfully submitted,

/s/ Tara Twomey

TARA TWOMEY
Counsel of Record
MATTHEW J. MASON
NATIONAL CONSUMER BANKRUPTCY
RIGHTS CENTER
1501 The Alameda, Suite 200
San Jose, CA 95126
(831) 229-0256
tara.twomey@comcast.net

Dated: February 26, 2019

ADDENDUM A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

THE MORNING STAR COMPANY, et al.

Appellants,

v.

ROBERT BENECH,

Appellee.

Case No. 17-CV-05100-LHK

ORDER VACATING ORDER OF BANKRUPTCY COURT

THE MORNING STAR COMPANY, et al.

Appellants,

v.

ROBERT BENECH,

Appellee.

Case No. 17-CV-07108-LHK

ORDER VACATING ORDER OF BANKRUPTCY COURT

Appellants Morning Star Company, Weintraub Tobin Chediak Coleman Grodin Law Corporation, and Chris Rufer ("Appellants") appeal the Bankruptcy Court's order finding Appellants in contempt for violating the discharge injunction of Robert Benech ("Appellee"). *Morning Star Company et al. v. Benech*, Case No. 17-CV-05100-LHK ("*Morning Star I*"). Appellants also appeal the Bankruptcy Court's subsequent order awarding Appellee $19,247.74 in attorney's fees and costs

spent as a result of Appellee's violation of the discharge injunction. *Morning Star Company et al. v. Benech*, Case No. 17-cv-07108-LHK ("*Morning Star II*").[3] Having considered the parties' submissions, the relevant law, and the record in this case, the Court VACATES both orders and REMANDS for reconsideration of the contempt finding.

I. BACKGROUND

A. Factual Background

On October 8, 2009, Appellee executed a promissory note secured by a Deed of Trust in favor of Appellant Chris Rufer ("Rufer") in the amount of $310,000 ("the Promissory Note"). *Morning Star I*, ECF No. 10 (Appellant's Amended Excerpts of Record, or "ER") at 154. To secure Appellee's obligations under the Promissory Note, a Deed of Trust was recorded against Appellee's property in San Francisco, California. *Id.* On December 31, 2010, Rufer assigned his rights and obligations under the Promissory Note and Deed of Trust to Appellant Morning Star Company ("Morning Star"). *Id.* at 155.

On April 17, 2012, Appellee entered into a Severance and Release Agreement ("Severance Agreement") with VSP Products, Inc. ("VSP") which is owned by Rufer. *Id.* at 155. Prior to the Severance Agreement, Appellee was an employee of VSP. *Id.* The Severance Agreement amended the principal owed by Appellee under the Promissory Note to $250,000. *Id.*

---

[3] The Court granted the parties' stipulation to consolidate the two appeals *Morning Star I*, ECF No. 17; *Morning Star II*, ECF No. 5.

On December 20, 2013, Appellee filed for Chapter 7 bankruptcy, listing a $250,000 secured debt to Rufer. *Id.* at 129. On March 28, 2014, Appellee received his discharge. *Id.* at 170. Appellants do not dispute that this discharged the $250,000 Appellee owed under the Promissory Note. The bankruptcy case closed on August 15, 2014. *Id.* at 114.

On April 1, 2016, Appellee and Morning Star entered into a Promissory Note Payoff and Standstill Agreement ("Standstill Agreement"). *Id.* at 135–39 (text of the Standstill Agreement).

The Standstill Agreement obligated Appellee to pay Morning Star the entire balance of the already-discharged Promissory Note plus interest, which amounted to $345,334.59 plus an additional $51.37 of interest each day. *Id.* at 135–36. For its part, Morning Star agreed to delay its foreclosure of Appellee's San Francisco property until June 1, 2016. *Id.* at 136. The Standstill Agreement makes no mention of the bankruptcy proceedings. Appellee and Morning Star were both represented by counsel, but Appellee has since sued his former attorneys for malpractice. *Id.* at 92–95 (complaint in malpractice suit).

Appellee's sale of his San Francisco property resulted in a payment of $126,965.94 to Morning Star. *Id.* at 156. On February 15, 2017, Morning Star filed a complaint against Appellee in Superior Court for the County of Yolo that sought to enforce payment of the Promissory Note that had been discharged in bankruptcy. *Id.* at 153–58 (copy of complaint). On March 20, 2017, Appellee informed Morning Star through his current counsel that the

Promissory Note had been discharged in bankruptcy and asked Morning Star to dismiss the state court action. *Id.* at 145. Morning Star refused. *Id.* at 146–49. Instead, Morning Star filed an amended complaint that alleged Appellee had breached the Standstill Agreement instead of the Promissory Note and alleged that the Standstill Agreement was supported by separate consideration. *Id.* at 172–79.

B. Procedural History

On May 2, 2017, Appellee filed a motion to reopen his bankruptcy case in order to file a motion for damages against Morning Star for violating the discharge injunction. *Id.* at 103–04. On May 20, 2017, the Bankruptcy Court denied this motion on the grounds that the motion was unnecessary in order to bring a contempt motion. *Id.* at 104.

On June 29, 2017, Appellee filed a motion for contempt. *Id.* at 113–122 (copy of motion). On August 17, 2017, the Bankruptcy Court granted Appellee's motion and found Appellants in contempt. *Id.* at 1–3. The Bankruptcy Court, subject to further proof, awarded Appellee attorney's fees and costs incurred as a result of Appellants' violation of the discharge injunction and emotional distress damages. *Id.* at 2. The Bankruptcy Court denied an award of punitive damages. *Id.* On September 1, 2017, Appellants appealed the Bankruptcy Court's order finding Appellants in contempt. *Morning Star I*, ECF No. 1 (notice of appeal).

On December 5, 2017, the Bankruptcy Court awarded Appellee $19,247.74 in attorney's fees and costs. *Morning Star II*, ECF No. 1-2. On December 14, 2017, Appellants appealed the Bankruptcy Court's order awarding attorney's fees and costs.

Morning Star II, ECF No 1 (notice of appeal). On March 28, 2018, the Court granted the parties' stipulation to consolidate the two appeals. *Morning Star I*, ECF No. 17; *Morning Star II*, ECF No. 5.

On November 29, 2017, Appellants filed their opening brief. *Morning Star I*, ECF No. 8 ("Appellant Br."). On January 3, 2018, Appellee filed his response brief. *Morning Star I*, ECF No. 14 ("Appellee Br."). On January 17, 2018, Appellants filed their reply. *Morning Star I*, ECF No. 16 ("Reply Br.").

II. LEGAL STANDARD

A federal district court has jurisdiction to entertain an appeal from a bankruptcy court under 28 U.S.C. § 158(a), which provides: "The district courts of the United States shall have jurisdiction to hear appeals ... from final judgments, orders, and decrees[ ] of bankruptcy judges[.]" On appeal, a district court reviews a bankruptcy court's conclusions of law de novo, and the bankruptcy court's factual findings for clear error. *In re Greene*, 583 F.3d 614, 618 (9th Cir. 2009) (citing *In re Raintree Healthcare Corp.*, 431 F.3d 685, 687 (9th Cir. 2005)); *In re Salazar*, 430 F.3d 992, 994 (9th Cir. 2005); *see In re Taggart*, 548 B.R. 275, 286 (B.A.P. 9th Cir. 2016), *aff'd*, 888 F.3d 438 (9th Cir. 2018) ("*Taggart I*"). A bankruptcy court's "decision to impose contempt sanctions is reviewed for an abuse of discretion." *In re Taggart*, 888 F.3d 438, 443 (9th Cir. 2018) ("*Taggart II*").

III. DISCUSSION

The Bankruptcy Court found Appellants in contempt and awarded Appellee attorney's fees and

costs because the Bankruptcy Court found that Appellants had willfully violated the discharge injunction. Appellants argue that the Bankruptcy Court erred in finding them in contempt because they did not, in fact, violate the discharge injunction. Appellants argue in the alternative that even if they violated the discharge injunction the Bankruptcy Court misapplied the legal standard for a finding of contempt and should have conducted an evidentiary hearing. The Court rejects Appellants' initial argument, but agrees that the Bankruptcy Court misapplied the legal standard and should have conducted an evidentiary hearing.

A. Violation of the Discharge Agreement

Appellants' post-discharge contract with Appellee ("Standstill Agreement") revived debts Appellee had already discharged in bankruptcy. Appellants argue the Standstill Agreement could permissibly do this for three reasons. First, Appellants argue that the Standstill Agreement was valid because it was based on consideration separate from the debts Appellee discharged in bankruptcy. Second, Appellants argue that Appellee judicially admitted the Standstill Agreement is valid and therefore can no longer contend that the Standstill Agreement is not valid. Third, Appellants argue that Appellee forfeited any reliance on the discharge injunction because he voluntarily sought out and entered into the Standstill Agreement. None of these arguments are persuasive.

Appellants' first argument relies on distinguishing the Standstill Agreement from a reaffirmation agreement. Reaffirmation agreements are agreements "based at least 'in part' on the

discharged debt" and which therefore must comply with the requirements of 11 U.S.C. § 524(c). *In re Lopez*, 345 F.3d 701, 707 (9th Cir. 2003) (quoting § 524(c)); *see also Bobka v. Toyota Motor Credit Corp.*, 2018 WL 2382766, at *4 (S.D. Cal. May 24, 2018) (noting reaffirmation agreements "are contrary to the stated goal of a debtor receiving a fresh start" and are therefore "subject to intense judicial scrutiny and must comply with all statutory requirements" (citation omitted)). The Bankruptcy Court found that the Standstill Agreement did not comply with § 524(c)'s requirements, a finding Appellants do not dispute here. ER at 12 ("[T]o be a valid agreement it ... must ... satisfy the requirements of 524 (c). There are five requirements. None of them are satisfied and they couldn't be because it has to be entered into pre- prior to discharge.").

To avoid the Bankruptcy Court's finding, Appellants contend that the Standstill Agreement is not a reaffirmation agreement but is instead a valid post-petition agreement. Appellants suggest contracts (such as the Standstill Agreement) constitute valid post-petition agreements provided that there is "some new separate consideration for the subsequent agreement." Appellant Br. at 10. Appellants argue that they provided new consideration by agreeing to wait two months before foreclosing on Appellee's property, and that Appellee provided new consideration by agreeing to waive his claims against Chris Rufer, Morning Star, Tim Cruise and Nick Kastle. *Id.* at 10. Appellants point to *In re Heirholzer*, which found that a post-discharge contract was not a reaffirmation agreement because the creditor's "decision to forego

foreclosure represents new and sufficient consideration to support a binding post-discharge obligation." 170 B.R. 938, 941 (Bankr. N.D. Ohio 1994). Appellants also cite *In re Martin*, which found that "post-petition agreements can create an enforceable obligation." 474 B.R. 789, at *7 (B.A.P. 6th Cir. 2012).

Appellants' argument is not credible. By its terms, § 524(c) applies to "[a]n agreement between a holder of a claim and the debtor, the consideration for which, in whole *or in part*, is based on a debt that is dischargeable ... ." 11 U.S.C. § 524(c) (emphasis added). The Standstill Agreement reaffirms Appellee's debts to Appellants under an already-discharged promissory note, which is precisely why Appellants filed a lawsuit in state court to collect the balance due under the discharged promissory note. *Id.* at 153–58 (copy of state court complaint seeking to collect on discharged promissory note); Appellant Br. at 5 ("On February 15, 2017, Morning Star filed a verified complaint in Yolo County Superior Court seeking payment of the balance due."). Thus even assuming *arguendo* that Appellants' delay and Appellee's waiver were valid consideration, the Standstill Agreement would remain at least "in part" based on Appellee's reaffirmation of hundreds of thousands of dollars of previously discharged debt. Appellant Br. at 4 (noting that as part of the Standstill Agreement Appellee agreed that he still owed $345,334.59 plus interest under a note discharged in bankruptcy).

Heirholzer and *Martin* do not compel a different conclusion. To start, both decisions are out-of-circuit bankruptcy decisions which means they are not binding here. Moreover, *Heirholzer* was

premised on a finding that the post-discharge agreement was "completely separate from the initial note that was discharged in bankruptcy." 170 B.R. at 941. By contrast, the Standstill Agreement reaffirms debts owed under a promissory note that was discharged in bankruptcy. *See also In re Getzoff*, 180 B.R. 572, 575 (B.A.P. 9th Cir. 1995) (rejecting argument that, in light of *Heirholzer*, a post-petition agreement in which creditor traded an extension of a loan for debtor's promise to honor discharged debt was valid).

Furthermore, *Martin*'s statement that "post-petition agreements can create an enforceable obligation" referred to "debt that arises *after* the creditor files for bankruptcy relief ... ." 474 B.R. 789, at *7 (emphasis added). That holding is inapplicable here because Appellee's debt arose before bankruptcy. Furthermore, *Martin* affirmed a bankruptcy court's finding that a creditor was in contempt for violating the discharge injunction where the creditor sought to enforce a post-discharge agreement and relied on the same theory Appellants pursue here. *Id.* at *10 (affirming sanctions despite creditor's mistaken belief that post-petition agreement with debtor was valid because "debtor had voluntarily agreed to enter into a new contract with him"). The bottom line is that the Standstill Agreement is a reaffirmation agreement that did not comply with § 524(c)'s requirements. Thus, Appellants violated the discharge injunction.

Appellants' second argument is that Appellee has judicially admitted that the Standstill Agreement is valid and cannot now argue otherwise. Appellants' argument rests on Appellee's complaint in his malpractice suit against the attorneys who

advised him in connection with the Standstill Agreement. The complaint alleges that Appellee's erstwhile attorneys "should have advised Plaintiff that entering into the ... [Standstill] Agreement would be considered new consideration and that Plaintiff's obligations under the ... [Standstill] Agreement would therefore not be included in the discharge Plaintiff received in his bankruptcy case." Appellant Br. at 17. Appellants' theory is unpersuasive because the complaint's statement is not a judicial admission. "Judicial admissions apply only to factual statements, not statements of law." *Maloney v. Scottsdale Ins. Co.*, 256 F. App'x 29, 32 n.3 (9th Cir. 2007). A conclusion about the legal effect of a contract or a bankruptcy discharge is a statement of law, not a statement of fact.[4] Even assuming *arguendo* that some legal conclusions are binding, this statement is not one of them. The complaint is describing how the Standstill Agreement "would be considered" by others, not what the Standstill Agreement's actual legal effect is or how Appellee himself understands it. Thus, the statement does not bind Appellee to any particular view as to the Standstill Agreement's validity or invalidity.

Appellants' third argument is that Appellee cannot rely on the discharge injunction's protection because he voluntarily signed the Standstill Agreement after the discharge. Appellants rely on a

---

[4] More generally, it is a stretch for Appellants to rest their argument that the Standstill Agreement is valid on a lawsuit alleging Appellee's former lawyers committed malpractice by advising him to sign it.

strained reading of *In re Ybarra*, 424 F.3d 1018 (9th Cir. 2005), and *Siegel v. Federal Home Loan Mortgage Corp.*, 143 F.3d 525 (9th Cir. 1998). Appellants claim these cases show that a debtor cannot use a discharge injunction as a shield against contractual liability after "affirmatively seeking and obtaining the new" agreement following discharge from bankruptcy proceedings. Appellant Br. at 12.

Appellants read *Ybarra* and *Siegel* far too broadly because both decisions were concerned with the narrow issue of attorney's fees. *Siegel* "held that an award of attorney fees incurred post-petition based on a pre-petition cause of action was not discharged in bankruptcy." *Ybarra*, 424 F.3d at 1021. *Ybarra* simply "reaffirm[ed] that claims for attorney fees and costs incurred post-petition are not discharged where post-petition, the debtor voluntarily commences litigation or otherwise voluntarily 'return[s] to the fray.'" *Id.* at 1026 (quoting *Siegel*, 143 F.3d at 533–34) (second alteration in original). Neither decision states or implies that a contract reaffirming a discharged debt is somehow exempt from the discharge injunction. Moreover, even if *Ybarra* and *Siegel* could be read as Appellants suggest—and they cannot—Appellants fail to explain how this new exemption to the discharge injunction would excuse the Standstill Agreement's noncompliance with § 524(c)'s requirements for debts "based at least 'in part' on the discharged debt[s]." *Lopez*, 345 F.3d at 707.

In sum, the Court finds that the Standstill Agreement was barred by the discharge injunction. The Court now turns to whether the Bankruptcy Court's orders finding Appellants in contempt for attempting to enforce the Standstill Agreement and

awarding Appellee attorney's fees and costs were permissible.

B. Contempt Finding

A discharge under Chapter 7 of the bankruptcy code "discharges the debtor from all debts that arose before the date of the" bankruptcy petition. 11 U.S.C. § 727(b). Once issued, the discharge "operates as an injunction against the commencement or continuation of an action ... to collect, recover or offset any such debt as a personal liability of the debtor." 11 U.S.C. § 524(a)(2). A party who violates the discharge injunction can be held in contempt. *In re Zilog, Inc.*, 450 F.3d 996, 1007 (9th Cir. 2006). The party seeking contempt sanctions "must prove that the creditor (1) knew the discharge injunction was applicable and (2) intended the actions which violated the injunction." *Taggart II*, 888 F.3d at 443 (quoting *In re Bennett*, 298 F.3d 1059, 1069 (9th Cir. 2002)).

The requirement that the contemnor "(2) intended the actions which violated the injunction" is not at issue. *Taggart II*, 888 F.3d at 443.The Bankruptcy Court found that the action which violated the discharge injunction was filing the state court complaint to collect on the Standstill Agreement:

MS. OELSNER: No, I understand. No, no. I understand what you're saying and I – I have been doing this for 30 years, so I appreciate the argument you're making. But the entering into the second Standstill Agreement—

THE COURT: But that wasn't what violated the discharge. It was only when you sought to collect.

MS. OELSNER: By filing the complaint.

THE COURT: Right.

ER at 13. Appellants do not dispute that they intended to file the state court complaint. Thus, the second requirement is met because "[t]he focus is on whether the offending party's conduct violated the injunction and whether that conduct was intentional; it does not require a specific intent to violate the injunction." *In re Shaw*, 2017 WL 2791663, at *5 (B.A.P. 9th Cir. June 27, 2017); *see, e.g., In re Meints*, 2017 WL 5973319, at *7 (C.D. Cal. Jan. 4, 2017) (finding attorney's filing of a complaint warranted contempt sanctions where attorney knew of discharge injunction and intended to file complaint).

The parties' dispute instead centers on whether Appellants "(1) knew the discharge injunction was applicable" to the debts the Standstill Agreement purported to revive. *Taggart II*, 888 F.3d at 443. "This standard requires evidence showing the alleged contemnor was aware of the discharge injunction *and* aware that it applied to his or her claim." *Taggart I*, 548 B.R. at 288 (emphasis in original). If a creditor disputes that they had this knowledge, "a finding that they knew of the injunction, and thus willfully violated it, can only be made after an evidentiary hearing." *Zilog*, 450 F.3d at 1008. A creditor's "good faith belief that the discharge injunction does not apply to the creditor's claim precludes a finding of contempt, even if the

creditor's belief is unreasonable." *Taggart II*, 888 F.3d at 444.

Appellants argue that the Bankruptcy Court erred because it did not find that Appellants were aware that the discharge injunction applied to their attempt to enforce the Standstill Agreement. The Bankruptcy Court found Appellants willfully violated the discharge injunction because "as I read the pleadings, there is nothing to indicate that the respondents Morning Star and others didn't understand that this was a discharged debt." ER at 12–13 (hearing transcript). This is in one sense correct: Appellants do not meaningfully dispute that they knew the debt subject to the Standstill Agreement was discharged. However, that is only half of the inquiry because the "alleged contemnor ... [must be] aware of the discharge injunction **and** aware that it applied to his or her claim." *Shaw*, 2017 WL 2791663, at *5 (bold emphasis in original); *Taggart I*, 548 B.R. at 288 (stating same). The Bankruptcy Court overlooked the latter requirement because Appellants argued at length that the discharge injunction did not apply to the Standstill Agreement, a position which could indicate that Appellants may not believe that the discharge injunction applies to their claims. *See* ER at 97–112 (opposition to motion for contempt arguing at length that the Standstill Agreement is not subject to the discharge injunction); Appellants' Br. 8–13 (repeating similar arguments here).

To be clear, the Bankruptcy Court could certainly have found that despite Appellants' arguments, Appellants were in fact aware that the discharge injunction applied to Appellants' claims. As Appellee points out, Appellants filed a notice of

special appearance before the Bankruptcy Court, the order discharging Appellee from bankruptcy was served on Appellants, and Appellants amended their complaint in the state court suit to plead around the discharge once Appellants were informed that their initial complaint violated the discharge injunction. ER 155, 168–71, 180–81. Nonetheless, it does not appear from the record that the Bankruptcy Court found that Appellants were aware that the discharge injunction applied to Appellants' claims.

By finding only that Appellants knew of the discharge injunction, but not that Appellants were aware of the discharge injunction's applicability, the Bankruptcy Court did not apply the correct legal standard for finding Appellants in contempt. *Taggart II*, 888 F.3d at 444 ("[T]he bankruptcy court abused its discretion by applying an incorrect rule of law."). The Bankruptcy Court therefore abused its discretion. *See Perry v. Brown*, 667 F.3d 1078, 1084 (9th Cir. 2012) ("[A]n error of law constitutes an abuse of discretion.").

Underscoring the point, both *Taggart* and *Shaw* reversed contempt sanctions on strikingly similar facts. In *Taggart*, a group of creditors knew of the debtor's discharge but nonetheless sought attorneys' fees based on "a good faith belief that the discharge injunction did not apply to their claims ... " *Taggart II*, 888 F.3d at 444. The Bankruptcy Court still imposed contempt sanctions on the creditors because it "concluded that it was irrelevant whether the Creditors held a subjective good faith belief that the discharge injunction did not apply to their claim." *Id.* at 443. The Bankruptcy Appellate Panel ("BAP") subsequently reversed the bankruptcy court, and the Ninth Circuit affirmed the BAP. *Id.* at

444. The Ninth Circuit agreed that the creditors' belief that the discharge injunction did not apply was incorrect but nevertheless found that the creditors' "good faith belief, even if unreasonable, insulated them from a finding of contempt." *Id.*

In a similar vein, *Shaw* reversed a bankruptcy court's imposition of sanctions on a creditor for a violation of the discharge injunction because the BAP found the bankruptcy court had conflated the creditor's undisputed knowledge of the injunction's existence with the creditor's knowledge of its applicability and had failed to make "any finding as to whether she knew the discharge injunction 'applied' to her causes of action in the FAC." *Shaw*, 2017 WL 2791663, at *5.

There is also a second, independent basis for vacating the sanctions award. Even assuming *arguendo* that the Bankruptcy Court's decision could be construed as finding that Appellants knew the discharge injunction was applicable, Appellants are correct to argue that an evidentiary hearing would be required to resolve that contested question of fact. Both the Ninth Circuit and BAP have so held. *Zilog*, 450 F.3d at 1008 (Ninth Circuit decision stating that "[i]f, as here, the creditors dispute that they had such knowledge [of the injunction], a finding that they knew of the injunction, and thus willfully violated it, can only be made after an evidentiary hearing."); *Shaw*, 2017 WL 2791663, at*6 (BAP decision finding that "since [the creditor] disputed that the discharge injunction applied to any of her causes of action in the FAC, the bankruptcy court was required to hold an evidentiary hearing, which it did not do."). This too compels reversal.

In sum, the Bankruptcy Court abused its discretion by failing to make a finding that the creditors were aware the discharge injunction applied to their claims and by failing to conduct an evidentiary hearing.

IV. CONCLUSION

For the foregoing reasons, the Court VACATES the Bankruptcy Court's order finding Appellants in contempt and the Bankruptcy Court's order awarding Appellee $19,247.74 in attorney's fees and costs and REMANDS for reconsideration of the sanctions award. On remand, the Bankruptcy Court may find Appellants in contempt and impose appropriate sanctions such as attorney's fees and costs or punitive damages once the Bankruptcy Court has held an evidentiary hearing and applied the legal standard.

IT IS SO ORDERED.

Dated: July 25, 2018
/s/ Lucy H. Koh
LUCY H. KOH
United States District Judge

No. 18-489

In the Supreme Court of the United States

BRADLEY WESTON TAGGART,

Petitioner,

v.

SHELLEY A. LORENZEN,
EXECUTOR OF THE ESTATE OF STUART BROWN, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE NATIONAL CREDITORS BAR ASSOCIATION IN SUPPORT OF RESPONDENTS

NICOLE M. STRICKLER
COUNSEL OF RECORD
MESSER STRICKLER, LTD.
225 WEST WASHINGTON STREET
SUITE 575
CHICAGO, IL 60606
(312) 334-3469
NSTRICKLER@MESSERSTRICKLER.COM

JUNE D. COLEMAN
CARLSON & MESSER LLP
5901 WEST CENTURY BLVD.
SUITE 1200
LOS ANGELES, CA 90045
(310) 242-2200
COLEMANJ@CMTLAW.COM

MARCH 28, 2019 — *COUNSEL FOR AMICUS CURIAE*

SUPREME COURT PRESS • (888) 958-5705 • BOSTON, MASSACHUSETTS

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

I. SUBJECTING ATTORNEYS TO CONTEMPT SANCTIONS FOR ADVANCING REASONABLE AND ZEALOUS LEGAL THEORIES CHILLS LEGAL ADVOCACY. 3

II. STRICT CONTEMPT SANCTIONS UNJUSTIFIABLY INCREASE RISK OF MALPRACTICE. 6

III. THE BANKRUPTCY APPELLATE PANEL'S BALANCED ANALYSIS WILL NOT LEAD TO THE PARADE OF HORRIBLES ARGUED BY APPELLANT. 8

IV. THE AMBIGUITY OF THE "RETURN TO THE FRAY" DOCTRINE FURTHER SUPPORTS THE NINTH CIRCUIT'S HOLDING. 10

CONCLUSION 11

TABLE OF AUTHORITIES

Page

CASES

California Artificial Stone Paving Co. v. Molitor, 113 U.S. 609 (1885) 11

Gauthier v. Twin City Fire Ins. Co., 2015 U.S. Dist. LEXIS 105402 (W.D. Wash. Aug. 11, 2015) 8

Guerrero v. RJM Acquisitions LLC, 499 F.3d 926 (9th Cir. 2007) 2

Heintz v. Jenkins, 514 U.S. 291 (1995) 2

In re Bennett, 2012 Bankr. LEXIS 3050 (Bankr. S.D. Tex. June 28, 2012) 10

In re Levine, 27 F.3d 594 (D.C. Cir. 1994) 5, 9

In re Residential Capital v. PHH Mortgage, 558 B.R. 77 (S.D.N.Y. 2016) 10

In re Ritchey, 512 B.R. 847 (Bankr. S.D. Tex. 2014) 6

In re Ybarra, 424 F.3d 1018 (9th Cir. 2005) 10

Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA, 559 U.S. 573 (2010) 2

Jones, Foster, Johnston & Stubbs, P.A. v. Prosight-Syndicate 1110 at Lloyd's, 2017 U.S. App. LEXIS 2550 (11th Cir. Feb. 14, 2017) 8

TABLE OF AUTHORITIES—Continued

Page

Link v. Wabash R. Co.,
370 U.S. 626 (1962) 6

Marx v. General Revenue Corp.,
568 U.S. 2 (2013) 2

McMurtry v. Botts,
2006 U.S. Dist. LEXIS 1655
(W.D. Ky. Jan. 17, 2006) 7

Partin v. Fischer,
6 Mass. L. Rep. 523 (1997) 7

Peyrano v. Sotelo (In re Peyrano),
2017 Bankr. LEXIS 1756
(B.A.P. 10th Cir. June 26, 2017) 6

Post v. St. Paul Travelers Ins. Co.,
691 F.3d 500 (3d Cir. 2012) 8

United States CFTC v. Lake Shore Asset Mgmt.,
540 F.Supp. 2d 994 (N.D. Ill. 2008) 8

United States v. Aleo,
681 F.3d 290 (6th Cir. 2012) 5

Wabaunsee v. Harris,
610 P.3d 782 (Okla. 1980) 7

STATUTES

11 U.S.C. § 523 7

Cal. Bus. & Prof. Code § 6068 5

TABLE OF AUTHORITIES—Continued

Page

JUDICIAL RULES

Fed. R. Bankr. P. 9011 9

Fed. R. Civ. P. 11 ..... 5, 9

Sup. Ct. R. 5 5

STATE AGENCY RULES

ABA Model R. of Prof. Cond. 3.1 ..... 3, 9

Cal. R. Prof. Cond. 3-200 4

OTHER AUTHORITIES

Alphabetical List of Jurisdictions Adopting Model Rules, (August 18, 2018) https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules/ 3

Monroe H. Freedman & Abbe Smith, *Understanding Lawyers' Ethics* (4th ed. 2010) 4

INTEREST OF AMICUS CURIAE

The NATIONAL CREDITORS BAR ASSOCIATION™ ("NCBA") is a nationwide, not-for-profit bar association of attorneys who represent creditors in all areas of creditors rights law.[1] Its members include over 500 law firms, all of whom must meet association standards designed to ensure experience and professionalism. Members are also guided by the NCBA's code of ethics, which imposes an obligation of self-discipline beyond the requirements of applicable laws and regulations.[2]

Members of the NCBA are regularly involved in the lawful collection of past-due consumer debts, including those debts that belong to debtors involved in bankruptcy. For this reason, NCBA members must interpret and comply with the often-unsettled requirements of applicable federal law, including Title 11 of the U.S. Code (the "Bankruptcy Code"). Members of the NCBA have a strong interest in ensuring that the Bankruptcy Code is interpreted and applied in a way that allows collection attorneys to execute their ethical

---

[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amicus curiae or its counsel made a monetary contribution to the preparation or submission of this brief. Petitioner filed a blanket consent to the filing of amicus briefs at the merits stage, in support of either party or neither party on February 6, 2019. Respondents provided written consent to the NCBA to file this amicus brief on March 22, 2019.

[2] The NCBA was formerly known as the National Association of Retail Collection Attorneys ("NARCA").

duty to advance their clients' legitimate interests—within the bounds of existing law—without constantly exposing themselves to substantial personal liability. The NCBA has participated as amicus curiae in other cases involving the ability of its member law firms and their attorneys to serve their clients. *See, e.g., Heintz v. Jenkins*, 514 U.S. 291 (1995); *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573 (2010); *Marx v. General Revenue Corp.*, 568 U.S. 2 (2013); *Guerrero v. RJM Acquisitions LLC*, 499 F.3d 926 (9th Cir. 2007).

The NCBA is the only national bar association dedicated solely to the needs of collection attorneys. A reversal the Ninth Circuit's ruling would erroneously and unfairly expose attorney and law firm members of the NCBA, and many creditor clients of those members, to unjustified sanctions under bankruptcy law. The NCBA thus has a direct interest in this litigation, and it has authorized the filing of this brief.

SUMMARY OF ARGUMENT

The NCBA urges this Court to affirm the Ninth Circuit's opinion finding that contempt sanctions were inappropriate. In doing so, the NCBA asks this Court to adopt the reasoning of the Bankruptcy Appellate Panel that found contempt sanctions were inappropriate because Respondents had a reasonable, objective, good faith basis for lacking knowledge of the applicability of the discharge in light of the ambiguity created by the state court judgment. By doing so, the Court will create a bright line to guide

creditor rights attorneys, like NCBA members, when advocacy on behalf of their clients is warranted. The requirement of a good faith belief in the application of the bankruptcy discharge will ensure that creditor rights attorneys do not face the Hobbesian choice of legitimately and reasonably advocating for their clients or refusing to advocate for their clients for fear of personal contempt sanctions, malpractice liability, or disciplinary actions if their informed judgment ends up being incorrect. It is important to note that all debts are not discharged, such as domestic support obligations and some, but not all, student loans. The Bankruptcy Appellate Panel's reasoned analysis creates a balanced approach that does not reward an attorney (or his client) for blindly ignoring the scope of a bankruptcy discharge but recognizes the tension between an attorney's obligations to her or his client and the justice system when relying upon judicial interpretations by state (and federal) courts.

I. SUBJECTING ATTORNEYS TO CONTEMPT SANCTIONS FOR ADVANCING REASONABLE AND ZEALOUS LEGAL THEORIES CHILLS LEGAL ADVOCACY.

Attorneys are ethically bound to advocate on behalf of their clients, including advocacy in good faith to extend, modify or reverse existing law. ABA Model R. of Prof. Cond. 3.1.[3] Law is not a science that can be

---

[3] Rather than cite to each state's disciplinary rules, Amicus cites to the ABA Model Rules of Professional Conduct, which are adopted in nearly every jurisdiction. *See* Alphabetical List of Jurisdictions Adopting Model Rules, (August 18, 2018) https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules/. In those jurisdictions that have not adopted the

weighed and measured with certainty. It ebbs and flows as cases with different facts present opportunities to establish the contours and scope of the law. Attorneys are the key to fleshing out these legal issues as novel fact patterns and shifting law present viable opportunities for change and clarification. The ability to make good faith arguments for the extension, modification and reversal of law is at the heart of our judicial system. *See generally* Monroe H. Freedman & Abbe Smith, Understanding Lawyers' Ethics (4th ed. 2010) 16 ("the lawyer is the client's 'champion against a hostile world'").

Reversing the Ninth Circuit's decision will negatively impact an attorney's ability to make good faith arguments for the extension, modification and reversal of law. Sanctions put attorneys at risk of discipline, revocation (or denial) of licensure, and tarnished reputations, all of which directly affect an attorney's livelihood. By imposing contempt sanctions on a strict liability basis, without consideration of the attorney's legitimate evaluation of her client's claims, attorneys are incentivized to compromise their duty of loyalty and zealous advocacy to their clients for fear of personal reprisal.

Nor is this a theoretical assumption that perhaps a disciplinary tribunal, or potential client, will learn of a contempt sanction. For instance, some attorneys are under an ethical obligation to report sanctions to

---

ABA's Model Rules of Professional Conduct, the different professional rules of conduct generally contain the same ethical obligations as the ABA's Model Rules; *see, e.g.*, Cal. R. Prof. Cond. 3-200 (attorney shall not present claims that are not warranted under existing law unless it can be supported by a good faith argument for an extension, modification or reversal of law).

the disciplinary arms of their licensing entities. *See* Cal. Bus. & Prof. Code § 6068(o)(3) (attorneys required to report judicial sanctions of $1,000 or more, except for discovery sanctions). This very Court, like many others, requires disclosure of sanction orders in its application for admission. *See* U.S. Supreme Court Rule 5(2) (attorney "must not have been the subject of any adverse disciplinary action . . . during [] 3-year period" prior to admission); U.S. Supreme Court Application for Admission to Practice, Question 12 ("Have you ever been disciplined, disbarred, sanctioned or suspended from the practice before any court . . . ?"). And, in the internet age, a simple Google search is all it takes for a potential client to learn of a sanctions order.

Clients rely extensively on their attorneys' judgment, advice, and professional competence. Moreover, as legal rules and obligations become more complex, clients are forced to rely increasingly on their attorneys, thus elevating the importance of attorney advice. Courts have repeatedly recognized that even the risk of sanctions could have a chilling effect on that advice and on advocacy. *See, e.g., United States v. Aleo*, 681 F.3d 290, 308 (6th Cir. 2012) (comparing the Rule 11 civil sanction standards with the higher standards in criminal cases); *In re Levine*, 27 F.3d 594, 596 (D.C. Cir. 1994) (recognizing that a Court's ruling on an evidentiary issue provides a necessary step in balancing the chilling effect sanctions have on a lawyer's efforts to advocate zealously and the appropriateness of sanctions for the orderly and efficient administration of justice). Appellant's position ignores the chilling impact strict liability in bankruptcy contempt proceedings about the applicability of

a discharge order will have in the face of good faith advocacy in reliance on judicial decisions.

II. STRICT CONTEMPT SANCTIONS UNJUSTIFIABLY INCREASE RISK OF MALPRACTICE.

A client routinely suffers the consequences of its attorney's errors. After all, "each party is deemed bound by the acts of his lawyer agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.'" *Link v. Wabash R. Co.*, 370 U.S. 626, 634 (1962) (internal citations omitted). Thus, mistakes of counsel are chargeable to the client even where the client merely relies, in good faith, on attorney advice.

This is true even in the context of contempt sanctions for violations of the discharge injunction. For example, in *In re Ritchey*, 512 B.R. 847, 851 (Bankr. S.D. Tex. 2014), the Court found not only the attorney, but the attorney's client, liable for a violation of the discharge injunction even though the client merely relied upon the advice of its counsel in pursuing a post discharge state court lawsuit. In such situations, courts have found the quality of legal advice received to be wholly irrelevant. *Peyrano v. Sotelo* (*In re Peyrano*), 2017 Bankr. LEXIS 1756, at *20 (B.A.P. 10th Cir. June 26, 2017) (not reported). Thus, even reliance on sound attorney advice, can subject an innocent client to liability. But, as the *In re Ritchey* Court noted, the client is not left to bear the burden alone. The client's recourse is against the attorney in a suit for malpractice. *Link*, 370 U.S. at 634, n.10.

Of course, certainty as to whether liability will lie in malpractice after an award of sanctions against

a client is a tougher question. Essentially, a legal malpractice claim is a "suit within a suit"; the plaintiff must demonstrate that he/she would have fared better in the underlying claim but for the attorney's negligence. *McMurtry v. Botts*, 2006 U.S. Dist. LEXIS 1655, at *1 (W.D. Ky. Jan. 17, 2006) (not reported). Take for example, a situation where an attorney has been hired to collect a debt owed to its client and allegedly obtained by the debtor by false pretenses. The debt is arguably non-dischargeable under 11 U.S.C. section 523(a)(2)(A) and/or (a)(6). In the midst of the collection action, the judgment debtor files for bankruptcy and is granted a general Chapter 7 discharge during the stay of state court proceedings. Failure to continue collection proceedings after the discharge may constitute malpractice if the attorney fails to continue. *See Partin v. Fischer*, 6 Mass. L. Rep. 523 (1997). But, litigation is inherently uncertain and the attorney risks strict liability contempt sanctions if the state court—or its appellate court for that matter—disagrees that the debt was obtained by fraud. While it is true that "[a]n attorney who acts in good faith and in an honest belief that his advance and acts are well founded and in the best interest of his client" may have a defense to malpractice, the prospect of strict liability sanctions or defending a malpractice action is not a pleasant choice. *Wabaunsee v. Harris*, 610 P.3d 782 (Okla. 1980).

While some may argue that there would be no harm due to malpractice insurance, it should be noted that a malpractice claim may or may not be insurable. A request for sanctions at heart is a demand for money. Accordingly, it may qualify as a "claim" against an attorney or her law practice. *Post v. St. Paul Travelers*

Ins. Co., 691 F.3d 500, 504 (3d Cir. 2012) (client's request for attorneys' fees as an item of relief in its answer to a sanctions petition constituted a civil proceeding that sought damages, and thus a suit, thereby triggering malpractice policy). Professional liability policies often exclude coverage for those claims seeking punitive or exemplary damages, sanctions, fines or penalties, with the idea that such awards serve to punish for deliberate wrongful conduct. *See, e.g., Jones, Foster, Johnston & Stubbs, P.A. v. Prosight-Syndicate 1110 at Lloyd's*, 2017 U.S. App. LEXIS 2550 (11th Cir. Feb. 14, 2017) (not for publication). While some courts have found exception depending upon the styling of the sanctions motion (*see Gauthier v. Twin City Fire Ins. Co.*, 2015 U.S. Dist. LEXIS 105402 (W.D. Wash. Aug. 11, 2015) (not reported)), there is palpable risk that a well-meaning attorney can be held personally liable for a considerable sanction award notwithstanding the maintenance of insurance. And of course, any claim will likely cause the insurance rate to increase.

III. THE BANKRUPTCY APPELLATE PANEL'S BALANCED ANALYSIS WILL NOT LEAD TO THE PARADE OF HORRIBLES ARGUED BY APPELLANT.

Attorneys are ethically bound to advocate on behalf of their clients, but this obligation is not boundless. *See, e.g., United States CFTC v. Lake Shore Asset Mgmt.*, 540 F.Supp. 2d 994, 996 (N.D. Ill. 2008) ("Zealous advocacy is laudable, but at a certain point can turn into conduct that strikes at the heart of the court's core function of resolving disputes.") Attorneys may only assert arguments that have a good faith basis in law and fact, including arguments for the extension,

modification or reversal of existing law. *See* ABA Model R. of Prof. Cond. 3.1; *see also* Federal Rule of Civil Procedure 11(b)(2) ("By presenting to the court a pleading, written motion, or other paper . . . an attorney or unrepresented party certifies that to the best of the person's knowledge . . . [that] the claims defenses, and other legal contentions are warranted by existing law or nonfrivolous argument for extending, modifying, or reversing existing law or for established new law.); Federal Rule of Bankruptcy Procedure 9011(b)(2) (Bankruptcy Court's Rule 11 counterpart).

In this case, the good faith basis is established by Mr. Brown's reliance on the state court's ruling. The Bankruptcy Appellate Panel's decision correctly draws a line between frivolous conduct and zealous advocacy based on the state court's judicial determination. Moreover, this is an analysis that courts are familiar with and address regularly, for instance in civil cases under Federal Rule of Civil Procedure 11, Bankruptcy Rule 9011, and their state law counterparts.

Further, from a fundamental perspective of fairness, attorneys should be able to rely on judicial determinations. Attorneys often receive, voluntarily or involuntarily, court guidance in the midst of an ongoing proceeding. Reserving sanctions for those scenarios where attorneys act with subjective bad faith ensures that only truly wrongful conduct is punished. *See In re Levine*, 27 F.3d at 596 (recognizing that a Court's ruling on an evidentiary issue provides a necessary step in balancing the chilling effect sanctions have on a lawyer's efforts to advocate zealously and the appropriateness of sanctions for the orderly and efficient administration of justice). Here, Mr. Brown

relied upon a judicial determination, and Appellant would have this Court ignore that reasonable reliance and permit contempt sanctions. Such a notion is truly contrary to fundamental notions of fairness, punishing an attorney for trying to do the right thing.

IV. THE AMBIGUITY OF THE "RETURN TO THE FRAY" DOCTRINE FURTHER SUPPORTS THE NINTH CIRCUIT'S HOLDING.

Not all legal concepts are set in stone. Relative to this case, there remains significant disagreement as to the concept of "returning to the fray" in bankruptcy courts. Some courts have refused to recognize the doctrine at all, insisting that it conflicts with the Bankruptcy Code and prior precedent. *See, e.g., In re Residential Capital v. PHH Mortgage*, 558 B.R. 77 (S.D.N.Y. 2016) ("There is . . . no basis for reading an exception for "voluntarily . . . returning to the fray" into the Bankruptcy Code."). Others fully embrace the doctrine without much analysis. *In re Bennett*, 2012 Bankr. LEXIS 3050, at *16 (Bankr. S.D. Tex. June 28, 2012) (assuming application of the doctrine without any independent analysis). The doctrine is a creature of case law, which continues to this day to develop based upon an underlying policy aimed at preventing debtors from using the bankruptcy "discharge shield . . . as a sword . . . to undertake risk-free litigation at others' expense." *In re Ybarra*, 424 F.3d 1018, 1026 (9th Cir. 2005).

As shown in the procedural history of this very case, distinguished justices from both state and federal courts have disagreed as to the proper application of the doctrine. As the United States' Brief indicates, that alone raises the question of whether contempt

proceedings are even appropriate. *California Artificial Stone Paving Co. v. Molitor*, 113 U.S. 609, 618 (1885). That point aside, the fact remains that an attorney would have little motivation to assert this doctrine in the future for fear of its ultimate rejection. While a debtor is certainly deserving of a "fresh start" under the Bankruptcy Code, that purpose is not served by allow the debtor a free attack on its former creditors. Put simply, there is no sound policy reason for converting contempt proceedings into a weapon to stifle entirely appropriate advocacy.

CONCLUSION

For all of the foregoing reasons, the NCBA respectfully submits that the decision of the Ninth Circuit should be affirmed. Mr. Brown's pursuit of attorneys' fees as an offset to the value of the business interest based on his reliance on the state court's decision was not contemptuous. A good faith argument in reliance on judicial determinations in the specific case and the unsettled nature of the law in general supports the conclusion that the conduct was not contemptuous. Moreover, the strict liability analysis argued by Appellant would expose the attorney to an unjustifiable risk of significant sanctions, discipline, revocation (or denial) of licensure, reputational harm, and injury to the attorney's livelihood. Further, it creates an unresolvable conflict with an attorney's duties of loyalty and zealous advocacy to its creditor client in light of these personal risks. Accordingly, the Supreme Court should affirm the Ninth Circuit's

decision, and find that the standard to determine contempt under these circumstances is an objective, reasonable standard.

Respectfully submitted,

NICOLE M. STRICKLER
COUNSEL OF RECORD
MESSER STRICKLER, LTD.
225 WEST WASHINGTON STREET
SUITE 575
CHICAGO, IL 60606
(312) 334-3469
NSTRICKLER@MESSERSTRICKLER.COM

JUNE D. COLEMAN
CARLSON & MESSER LLP
5901 WEST CENTURY BLVD.
SUITE 1200
LOS ANGELES, CA 90045
(310) 242-2200
COLEMANJ@CMTLAW.COM

COUNSEL FOR AMICUS CURIAE
NATIONAL CREDITORS BAR ASSOCIATION

MARCH 28, 2019

No. 18-489

In The
Supreme Court of the United States

BRADLEY WESTON TAGGART,

Petitioner,

v.

SHELLEY A. LORENZEN, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* THE HONORABLE EUGENE WEDOFF (RET.), THE HONORABLE LEIF CLARK (RET.), AND A GROUP OF LAW PROFESSORS IN SUPPORT OF PETITIONER

DAVID R. KUNEY
Counsel of Record
9200 Cambridge Manor Court
Potomac, MD 20854
301-299-9544
davidkuney@dkuney.com

Attorney for Amici Curiae

February 2019

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF THE AMICI CURIAE	1
SUMMARY OF THE ARGUMENT	5
ARGUMENT	9
I. The text, structure and history of the U.S. bankruptcy laws demonstrate that Congress intended to provide a vigorous contempt sanction for violation of the discharge injunction of § 524(a)(2)	9
A. The Bankruptcy Act of 1898 reflects Congress' goal of providing ample protection against creditors seeking to disregard the bankruptcy discharge	9
B. Congress amended the 1898 Act in 1970 to further strengthen the discharge protection by including an injunction against collection activities on discharged debts	16
C. The 1978 Code added §§ 524(a)(1) and (a)(2) to prevent creditor conduct in derogation of the discharge; the Ninth Circuit's decision is contrary to the Congressional goals and purposes	18
D. Congress did not intend for creditors to be able to disregard the discharge injunction based on a subjective standard of good faith or ignorance of the law	21

TABLE OF CONTENTS – Continued

Page

II. The Ninth Circuit's use of a subjective defense of good will will permit creditors to easily disregard the discharge injunction 25

III. Empirical studies and academic scholarship demonstrate that the bankruptcy discharge has been effective in achieving the Congressional goals and policies that underlie the discharge provisions 31

CONCLUSION..... 36

TABLE OF AUTHORITIES

Page

CASES

Bruce v. Fazilat (In re Bruce), Adv. No. 8-15 ap-01028, 2018 WL 3424581 (Bankr. C.D. Cal. July 12, 2018) 31

Cave v. Valley Collection Services, LLC, No. cv-15-00390, 2015 WL 12938941 (D. Ariz. June 18, 2015) 5

Cheek v. United States, 498 U.S. 192 (1992) 24

Dimock v. Revere Cooper Co., 117 U.S. 559 (1886).....16

Emmert v. Taggart (In re Taggart), 548 B.R. 275 (B.A.P. 9th Cir. 2016).....28

In re Dyer, 322 F.3d 1178 (9th Cir. 2003).....27

In re Hamilton, 540 F.3d 367 (6th Cir. 2008) ... 20, 25, 26

In re Hardy, 97 F.3d 1384 (11th Cir. 1996).....6, 24

In re Hyman, 502 F.3d 61 (2d Cir. 2007).....8

In re Meadows, 428 B.R. 894 (Bankr. N.D. Ga. 2010) 20

In re Rose, 565 B.R. 178 (Bankr. D. Nev. 2017).....22, 23

In re Taggart, 522 B.R. 627 (Bankr. D. Or. 2014).....24

Internal Revenue Service v. Murphy, 829 F.3d 29 (1st Cir. 2018) 24

Jerman v. Carlisle, McNellie, Rini, Kramer & Urlich, LPA, 130 S.Ct. 1605 (2010) 6, 10, 23, 24

Kelly v. Robinson, 479 U.S. 36 (1986).....10

TABLE OF AUTHORITIES – Continued

Page

Kolstad v. American Dental Assn., 527 U.S. 526 (1999) 24

Local Loan Co. v. Hunt, 292 U.S. 234 (1934) ..... *passim*

Lone Star Security Video, Inc. v. Gurrola (In re Gurrola), 328 B.R. 158 (B.A.P. 9th Cir. 2005) 17, 20

Lorenzen v. Taggart (In re Taggart), 888 F.3d 438 (9th Cir. 2018) ..... *passim*

McComb v. Jacksonville Paper Co., 336 U.S. 187 (1949) 6, 21

Midland Funding, LLC v. Johnson, 137 S.Ct. 1407 (2017) 7, 26

Morning Star Company v. Benech (In re Benech), 17-CV-05100-LHK (N.D. Cal. July 25, 2018) (NACBA App. 1a) 31

Parker v. Nelson (In re Nelson), No. 15-1416, 2016 WL 7321196 (B.A.P. 9th Cir. Dec. 15, 2016) 31

Rogerson v. Shaw (In re Shaw), No. 15-1406, 2017 WL 2791663 (B.A.P. 9th Cir. June 27, 2017) 31

Stellwagen v. Clum, 245 U.S. 605 (1918) 36

Strata Res. v. State, 264 S.W.3d 832 (Tex. App. 2008) 20, 26

Walls v. Well Fargo Bank, N.A., 276 F.3d 502 (9th Cir. 2002) 5

Wetmore v. Markoe, 196 U.S. 68 (1904) 15

TABLE OF AUTHORITIES – Continued

Page

Williams v. United States Fidelity & Guaranty Co., 236 U.S. 549 (1915) 15, 36

Wright v. Union Cent. Life Ins. Co., 311 U.S. 273 (1940) 11

STATUTES AND COURT RULES

11 U.S.C. §§ 101 *et seq.* 1

11 U.S.C. § 105(a) ..... *passim*

11 U.S.C. § 524(a)(1) ..... *passim*

11 U.S.C. § 524(a)(2) ..... *passim*

11 U.S.C. § 727 18

11 U.S.C. § 727(b) 18

15 U.S.C. § 1692k(c) 23

Bankruptcy Act of 1898, ch. 541, 30 Stat. 544 (1898) (repealed 1978) 11, 12, 14

Bankr. N.D. Ill. R. 2090-5(B) 29

Fed. R. Bankr. P. 4004(c)(1) 19

Fed. R. Civ. P. 8 (Committee Note) 26

Tex. R. Civ. P. 94 26

Pub. L. No. 91-467, § 3, 84 Stat. 990 (1970) 16

TABLE OF AUTHORITIES – Continued

Page

LEGISLATIVE HISTORY

116 Cong. Rec. 34,818 (Statement of Rep. Wiggins) 17

House Report of 1897, H.R. Rep. No. 65, 55th Cong., 2d Sess. (1897) 13

H.R. Rep. No. 91-1502 (1970), *as reprinted in* 1970 U.S.C.C.A.N. 4156 17

H.R. Rep. No. 95-595 (1977) *as reprinted in* 1978 U.S.C.C.A.N. 5963 ..... 20, 22, 29

S. Rep. No. 1688 (1960) (Comm. Rep.) 7

S. Rep. No. 95-989 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5787 20

TREATISES

2 *William Blackstone, Commentaries* 9

Charles J. Tabb, *Bankruptcy Anthology* (2002) 9

OTHER AUTHORITIES

Maurie Backman, *This Is the No. 1 Reason Americans File for Bankruptcy*, The Motley Fool (May 1, 2017) 33

Vern Countryman, *New Dischargeability Law*, 45 Am. Bankr. L.J. 1 (1971) 16

TABLE OF AUTHORITIES – Continued

Page

Andrew F. Emerson, *So You Want to Buy a Discharge? Revisiting the Sticky Wicket of Settling Denial of Discharge Proceedings in the Chapter 7 Bankruptcy*, 92 Am. Bank. L.J. 111 (2018) 29

Peter A. Holland, *Junk Justice: A Statistical Analysis of 4,400 Lawsuits Filed by Debt Buyers*, 26 Loy. Consumer L. Rev. 179 (2014) 27, 30

Angela Littwin, *The Affordability Paradox: How Consumer Bankruptcy's Greatest Weakness May Account for Its Surprising Success*, 52 Wm. & Mary L. Rev. 1933 (2011) 30

March 2017 Bankruptcy Filings Down 4.7 Percent, United States Courts (Apr. 19, 2017), http://www.uscourts.gov/news/2017/04/19/march-2017-bankruptcy-filings-down-47-percent 8

John C. McCoid, II, *Discharge: The Most Important Development in Bankruptcy History*, 70 Am. Bankr. L.J. 163 (1996) 5

Amber J. Moren, Note, *Debtor's Dilemma: The Economic Case for Ride-Through in the Bankruptcy Code*, 122.6 Yale L.J. 1594 (2013) 35

F. Regis Noel, *A History of the Bankruptcy Law* (1919) 5, 15

Rafael I. Pardo, *An Empirical Examination of Access to Chapter 7 Relief by Pro Se Debtors*, 26 Emory Bankr. Dev. J. 5 (2009) 30

TABLE OF AUTHORITIES – Continued

Page

Katherine Porter & Deborah Thorne, *The Failure of Bankruptcy's Fresh Start*, 92 Cornell L. Rev. 67 (2006) 34

Michael D. Sousa, *The Persistence of Bankruptcy Stigma*, 26 Am. Bankr. Inst. L. Rev. 217 (2018) 32, 33, 34

William F. Stone, Jr. & Bryan A. Stark, *The Treatment of Attorneys' Fee Retainers in Chapter 7 Bankruptcy and the Problem of Denying Compensation to Debtors' Attorneys for Post-Petition Legal Services They Are Obligated to Render*, 82 Am. Bankr. L.J. 55 (2008) 29

Teresa A. Sullivan, et al., *As We Forgive Our Debtors: Bankruptcy and Consumer Credit in America* 77 (1999) 32, 35

Teresa A. Sullivan, et al., *Consumer Debtors Ten Years Later: A Financial Comparison of Consumer Bankrupts 1981–1991*, 68 Am. Bankr. L.J. 121 (1994) 35

Teresa A. Sullivan, et al., *Less Stigma or More Financial Distress: An Empirical Analysis of the Extraordinary Increase in Bankruptcy Filings*, 59 Stan. L. Rev. 213 (2006) 34

Teresa A. Sullivan, et al., *Limiting Access to Bankruptcy Discharge: An Analysis of the Creditors' Data*, 1983 Wis. L. Rev. 1091 (1983) 33

Teresa A. Sullivan, et al., *The Fragile Middle Class: Americas in Debt* 16 (2000) 33

TABLE OF AUTHORITIES – Continued

Page

Charles J. Tabb, *The History of the Bankruptcy Law in the United States*, 3 Am. Bankr. Inst. L. Rev. 5 (1995) 11, 12

Charles J. Tabb, *The Historical Evolution of the Bankruptcy Discharge*, 65 Am. Bankr. L.J. 325 (1991) ..... *passim*

R. Lewis Townsend, *Fresh Cash-Another Element of Bankrupt's Fresh Start?* 31 U. Miami L. Rev. 275 (1977) 13

James J. White, *Bankruptcy and Creditors' Rights: Cases and Materials* (1985) 12, 13

Jay L. Zagorski & Lois R. Lupica, *A Study of Consumers' Post-Discharge Finances: Struggle, Stasis, or Fresh-Start?* 16 Am. Bankr. Inst. L. Rev. 283 (2008) 34

INTEREST OF THE AMICI CURIAE[1]

The amici curiae, whose names are set forth below, include two retired United States bankruptcy judges and a group of law professors. Your amici teach courses on bankruptcy law, conduct research, and are frequent speakers and lecturers at seminars and conferences on bankruptcy law. Our interest in submitting this brief is to assist the Court by identifying the relevant statutory history leading to the enactment of §§ 524(a)(1) and (a)(2) of the U.S. Bankruptcy Code,[2] as well as legal scholarship and empirical studies demonstrating the effectiveness of the discharge provisions in achieving the Congressional goals, both for individual debtors and the larger economy. This statutory history provides critical guidance in framing the appropriate legal standard for violations of the discharge injunction under § 524(a)(2). The Ninth Circuit's decision will significantly weaken the protection of the Code's discharge provisions and will thereby cause unwarranted financial injury both to individual debtors and to the larger economy.

The Honorable Eugene Wedoff (ret.) served as a United States Bankruptcy Judge in the Northern District of Illinois in Chicago from 1987 to 2015 and as Chief Judge from 2002 to 2007. Judge Wedoff was

---

[1] Pursuant to Supreme Court Rule 37, counsel of record for petitioner and respondents have consented to its filing. No counsel for a party authored this brief in whole or in part, and no person other than amici or their counsel contributed any money to fund its preparation or submission.

[2] 11 U.S.C. §§ 101 *et seq.* (the "Code").

formerly a partner at Jenner & Block. He served as chair of the Advisory Committee on Bankruptcy Rules from 2004 to 2014 and as a governor, secretary, and president of the National Conference of Bankruptcy Judges through 2015. He is the immediate past president of the American Bankruptcy Institute.[3] He is a Fellow of the American College of Bankruptcy and a conferee of the National Bankruptcy Conference.

The Honorable Leif M. Clark (ret.) served as a United States Bankruptcy Judge for the Western District of Texas from 1987 to 2012. Prior to that, he was a partner with Cox & Smith (now Dykema Cox Smith). He served on the endowment boards for both the American Bankruptcy Institute and the National Conference of Bankruptcy Judges, evaluating grant requests for empirical work in bankruptcy. He assisted in developing and administering judicial training programs for judges in Central and Eastern Europe. He is a member of the American College of Bankruptcy and a conferee of the National Bankruptcy Conference, and continues to speak on bankruptcy topics nationwide.

Professor Margaret Howard is the Law Alumni Association Professor of Law, Emerita, at Washington and Lee University School of Law, Lexington, Virginia. She holds a B.A. from Duke University, a J.D. and M.S.W. from Washington University in St. Louis, and an LL.M. from Yale University. She has served as the

---

[3] The views set forth herein are the personal views of Judge Wedoff and the named amici and may not reflect any position of the American Bankruptcy Institute, which has not participated in this appeal.

Scholar in Residence at the American Bankruptcy Institute, and as the American Bankruptcy Institute's Vice President in charge of the Research Grants Committee. She is a fellow of the American College of Bankruptcy and the American Law Institute. Her publications include *A Theory of Discharge in Consumer Bankruptcy,* 48 Ohio St. L.J. 1047 (1987), and *Stripping Down Liens: Section 506(d) and the Theory of Bankruptcy*, 65 Am. Bankr. L.J. 373 (1991).

David R. Kuney is as an Adjunct Professor at the Georgetown University Law Center, and was previously such at American University's Washington College of Law and New York Law School. He was formerly a partner at the law firm of Sidley & Austin. He serves on the Board of Directors of the American Bankruptcy Institute. He is a fellow in the American College of Bankruptcy and the American College of Real Estate Lawyers.

Professor Bruce A. Markell is the Professor of Bankruptcy Law and Practice at Northwestern Pritzker School of Law, part of Northwestern University. He is a former bankruptcy judge and a former member of the Ninth Circuit's Bankruptcy Appellate Panel. He is a co-author of four casebooks in bankruptcy, contracts, secured transactions, and securitization. He is a founding member of the International Insolvency Institute, a member of the Board of Editors of *Collier on Bankruptcy*, an elected member of the American Law Institute, a conferee of the National Bankruptcy Conference, and a fellow of the American College of

Bankruptcy, where he was the Scholar in Residence from 2013 to 2016.

Professor Michael D. Sousa is an Associate Professor of Law at the University of Denver Sturm College of law. He received his J.D. from Rutgers University School of Law, his LL.M. in bankruptcy from St. John's University School of Law, his Master's of Arts degree in anthropology from the University of Denver, and is currently pursuing a Ph.D. in sociology from the University of Colorado–Boulder. He is a member of the Advisory Board for the LL.M. in Bankruptcy Program at St. John's University School of Law and sits on the Editorial Boards for both the American Bankruptcy Institute Law Review and the American Bankruptcy Law Journal.

Professor Jack F. Williams is a Professor of Law at Georgia State University and the Center for Middle East Studies, where he teaches and/or conducts research on bankruptcy and business organizations; mergers and acquisitions; and taxation and statistics. He is the Scholar in Residence of the Association of Insolvency and Restructuring and a fellow in the American College of Bankruptcy. He holds a B.A. in economics from the University of Oklahoma, a J.D. with High Honors from George Washington University National Law Center, and a Ph.D. in archaeology from the University of Leicester in Leicester, United Kingdom.

SUMMARY OF THE ARGUMENT

The bankruptcy discharge is one of the foundational aspects of bankruptcy law. Commentators have observed that the bankruptcy discharge "ranks ahead in importance of all other [provisions] in Anglo-American bankruptcy history. . . ." John C. McCoid, II, *Discharge: The Most Important Development in Bankruptcy History*, 70 Am. Bankr. L.J. 163, 164 (1996). The discharge is the "crown jewel of [bankruptcy] legislation." F. Regis Noel, *A History of the Bankruptcy Law* 200 (1919).

In order to ensure that the discharge is effective, Congress provided that the discharge gives rise to a statutory injunction and voids any judgment or action taken in derogation of the discharge. 11 U.S.C. §§ 524(a)(1) and (a)(2). Section 105 of the Code authorizes a bankruptcy court to enforce the injunction through a contempt sanction. Indeed, contempt may be the sole remedy for a violation of the discharge injunction.[4]

Despite this, the Ninth Circuit held that a creditor's knowing violation of the discharge injunction could not be remedied by a contempt sanction if the creditor had a good faith, subjective belief that the discharge did not pertain to *its claim*. *Lorenzen v. Taggart*

---

[4] Various courts have held that the exclusive remedy for violation of the discharge injunction is a contempt proceeding. *Walls v. Wells Fargo Bank, N.A.*, 276 F.3d 502, 508 (9th Cir. 2002). *See also Cave v. Valley Collection Services, LLC*, No. cv-15-00390, 2015 WL 12938941 (D. Ariz. June 18, 2015).

(*In re Taggart*), 888 F.3d 438 (9th Cir. 2018). The court held that even an "unreasonable belief" can satisfy the good faith standard. *Id.* at 444 (a "good faith belief, even if unreasonable" insulates creditors from a contempt finding). In effect, the court's ruling makes ignorance of the law a complete defense to a knowing violation of the discharge injunction, even if the creditor's ignorance of the law is based on unreasonable assumptions or conduct (for example, a failure to investigate the discharge's scope).[5]

This Court has long held that civil contempt does not countenance a good faith belief defense. *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949).[6] The same rule has been applied in the bankruptcy context by the other circuits which do not permit a subjective "good faith" test to be a valid defense for disregarding the discharge injunction, and certainly none permit an unreasonable belief to be a defense. For example, the Eleventh Circuit held that "the focus of the court's inquiry in civil contempt proceedings is not on the subjective beliefs or intent of the alleged contemnor in complying with the order, but whether in fact their conduct complied with the order at issue." *In re Hardy*, 97 F.3d 1384, 1390 (1996) (citation omitted).

---

[5] This Court recently rejected a similar defense of "ignorance of the law" in another consumer protection context. *Jerman v. Carlisle, McNellie, Rini, Kramer & Urlich, LPA*, 130 S.Ct. 1605, 1607 (2010) (discussed below).

[6] "Since the purpose [of civil contempt] is remedial, it matters not with what intent the defendant did the prohibited act." *Id.* at 191.

Your amici urge this Court to reject the subjective standard of "unreasonable" good faith in *Taggart*, and thus reverse the Ninth Circuit on the following grounds, in addition to those asserted by the petitioner.

First, while the Code contains no express statement on the legal standard for a contempt sanction, the history and structure of the discharge provisions do provide the basis for the correct legal standard. Congress intended for the discharge to provide a "fresh start," and since passage of the 1898 Bankruptcy Act has increasingly provided for protection of that fresh start, culminating in the statutory injunction of § 524(a)(2) in the current Bankruptcy Code. The principal purpose of § 524(a)(2) is to prohibit the kind of conduct that occurred here—seeking payment of claims that have been discharged. The history and structure demonstrate that Congress did not intend to permit creditors to disregard the discharge based on an assertion of a subjective, good faith belief that their conduct somehow fell outside the scope of the discharge.

Second, the Ninth Circuit's decision will permit abusive creditor conduct. Congress has noted that institutional creditors often seek to intimidate debtors into surrendering their valid discharge rights. *See* S. Rep. No. 1688 at 2-3 (1960) (Comm. Rep.); *see also Midland Funding, LLC v. Johnson*, 137 S.Ct. 1407, 1416-18 (2017) (Sotomayor, J., dissenting) (noting practice of institutional debt collectors to sue on time barred claims in the hope that consumers will not respond to the lawsuit). The Ninth Circuit's decision will

encourage the filing of claims on discharged debt by aggressive creditors who will be able to argue that despite their *actual* knowledge of the discharge order, they were unaware that it applied to *their* claims and so cannot be found in contempt. The decision removes much of the risk in a creditor's seeking to collect upon a discharged claim.

Third, a large body of empirical data and peer-reviewed scholarship demonstrate that the discharge has been effective in achieving the Congressional goals and purposes. Nearly one million individuals seek bankruptcy relief each year.[7] Reversal of the Ninth Circuit's decision is imperative in order to prevent harm to significant numbers of bankruptcy debtors. It is the bankruptcy discharge that alters the often-grim reality facing many bankruptcy debtors and restores them to being productive members of the economy. The "failure to achieve discharge can amount to a financial death sentence." *In re Hyman*, 502 F.3d 61, 66 (2d Cir. 2007).

For over 100 years, this Court has acknowledged that the discharge provisions carefully balance the needs of the debtor and the larger economy. *Local Loan Co. v. Hunt*, 292 U.S. 234, 245 (1934) holding that the discharge is *both* a "fundamental private necessity" and a matter of "great public concern." The

---

[7] The number of non-business bankruptcy filings in 2017, 2016, and 2015 was as follows: 770,901, 808,781, and 911,086, respectively. *March 2017 Bankruptcy Filings Down 4.7 Percent*, United States Courts (Apr. 19, 2017), http://www.uscourts.gov/news/2017/04/19/march-2017-bankruptcy-filings-down-47-percent.

Congressional intent to ensure a meaningful and effective discharge for bankruptcy debtors, as well as the implementation of this Court's recognition of these goals, mandates reversal of the Ninth Circuit's decision.

ARGUMENT

I. The text, structure and history of the U.S. bankruptcy laws demonstrate that Congress intended to provide a vigorous contempt sanction for violation of the discharge injunction of § 524(a)(2).

A. The Bankruptcy Act of 1898 reflects Congress' goal of providing ample protection against creditors seeking to disregard the bankruptcy discharge.

The discharge provisions are the heart and soul of bankruptcy for individual debtors. Over 200 years ago Sir William Blackstone wrote that through the discharge "the bankrupt becomes a clear man again; and, by the assistance of his allowance and his own industry, may become a useful member of the commonwealth." 2 *William Blackstone, Commentaries**484. More recently, Professor Charles Tabb writes, "[T]he introduction of the discharge [into modern bankruptcy law] could well be considered the single most important event in bankruptcy history." Charles J. Tabb, *Bankruptcy Anthology* 524 (2002).

Despite the central importance of the bankruptcy discharge, the Ninth Circuit held that a creditor can

avoid remedial sanctions for violating the discharge injunction of § 524(a)(2) based merely on the creditor's good faith belief that the discharge injunction does not apply to *its* claim, even if such belief is unreasonable. The Ninth Circuit held that respondents' faulty understanding of the effect of the discharge is a complete defense to the imposition of sanctions for their violation of the injunction. In short, the ruling by the Ninth Circuit makes ignorance of the law a defense to violating the discharge injunction, even if that ignorance is the result of unreasonable conduct or a failure to make due inquiry.

Congress did not intend for creditors to be able to disregard the discharge injunction based upon such a subjective showing of good faith. While the Code does not contain an express sanction for violation of the discharge injunction, the structure and history of the discharge provisions culminating in the enactment of § 524(a)(2) *do* provide ample guidance for the correct outcome in this case. In framing the appropriate legal standard to govern the imposition of contempt for violation it is critical to "look to the provisions of the whole law, and to its object and policy." *Kelly v. Robinson*, 479 U.S. 36, 43 (1986). *See also Jerman v. Carlisle, McNellie, Rini, Kramer & Urlich*, 130 S.Ct. 1605, 1607 (2010) (holding that in determining whether mistake of law is a defense the Court should look to the "statute's context and history"). The same applies here.[8]

---

[8] Further, bankruptcy law "must be liberally construed to give the debtor the full measure of the relief afforded by Congress,

Beginning in at least 1898, and continuing to the 1978 Code, Congress has enacted statutory protections that increasingly sought to prohibit creditor conduct that ignores the discharge, including suing debtors on discharged claims and to limit the need for judicial involvement in the discharge process. The Ninth Circuit's decision runs directly counter to the statutory history, weakens the discharge injunction, and encourages precisely the kind of creditor abuse that Congress has sought to eliminate.

The modern notion of the bankruptcy discharge came into being when Congress enacted the Bankruptcy Act of 1898.[9] This was the fourth federal bankruptcy law, and it demonstrated a decidedly "pro-debtor discharge policy."[10] Until then, American bankruptcy law had essentially looked to English bankruptcy law, which had first introduced the notion of a discharge in the Statute of Anne in 1705.[11]

---

lest its benefits be frittered away by narrow formalistic interpretations." *Wright v. Union Cent. Life Ins. Co.*, 311 U.S. 273, 279 (1940) (citation omitted).

[9] Bankruptcy Act of 1898, ch. 541, 30 Stat. 544 (1898) (repealed 1978). "The Bankruptcy Act of 1898 marked the beginning of the era of permanent federal bankruptcy legislation. The 1898 Act remained in effect for eighty years until being replaced by the Bankruptcy Reform Act of 1978." Charles J. Tabb, *The History of the Bankruptcy Law in the United States*, 3 Am. Bankr. Inst. L. Rev. 5, 23 (1995) (hereafter, "*History of Bankruptcy*").

[10] Charles J. Tabb, *The Historical Evolution of the Bankruptcy Discharge*, 65 Am. Bankr. L.J. 325, 364 (1991) (hereafter, "*Discharge*").

[11] "[The Statute of Anne] introduced the discharge of debts for the benefit of a debtor who cooperated in the bankruptcy

The 1898 Act altered the discharge process in two ways that pertain here. First, the 1898 Act removed the need for creditors' consent.[12] But more pertinent here, the 1898 Act sought to limit the need for judicial involvement in the granting of the discharge. Instead the Act provided for judicial intervention only to address a creditor's claim that the discharge was subject to some exception or denial.

> The United States Congress in 1898 did not just decline to give the bankruptcy court control over the discharge. At the same time, that control was taken away from creditors. The long-standing requirement of either creditor consent or a minimum dividend as a prerequisite to obtaining a discharge was eliminated. No check on discharges other than the statutory limitations remained. This innovation marked as much as anything else the arrival of the "modern" American pro-debtor discharge policy.

Tabb, *Discharge*, *supra*, at 364.

---

proceeding. . . . At the same time, however, the Statute of Anne raised the stakes even higher for uncooperative debtors by providing for the death penalty for fraudulent bankrupts." Tabb, *History of Bankruptcy*, at 10.

[12] Under the third bankruptcy Act, enacted in 1867, discharge could be denied if the debtor had committed a number of dishonest or illegal acts, but importantly, "[t]he consent of a majority of the creditors was still required for discharge in most cases." *See* James J. White, *Bankruptcy and Creditors' Rights: Cases and Materials* 32 (1985).

The Congressional intent to limit the involvement of the court in granting the discharge, and to eliminate creditor control is pertinent here because the effect of the Ninth Circuit's decision is just the opposite. The decision interjects the court post-bankruptcy in determining the ultimate efficacy of the discharge by determining whether there is a good faith basis for a creditors' disregarding the discharge. It also reinstates a form of creditor "consent." Under the Ninth Circuit's decision, the effectiveness of the discharge rises and falls on a judicial determination of the subjective state of mind of the creditor, a determination often made years after the discharge is granted. Congress envisioned the opposite role for the courts.

Also pertinent in this case, the legislative history to the Act of 1898 reflects Congress's intent to create a meaningful "fresh start," intended to benefit both debtors and the larger economic community.[13] Thus, House Report of 1897, H.R. Rep. No. 65, 55th Cong., 2d Sess. 30-32 (1897), in addressing the question of "who is a debtor" noted the public benefit from the discharge:

> [T]his vast number [of debtors] constitutes an army of men crippled financially—most of them active, aggressive, honest men who have met with misfortune in the struggle

---

[13] "The discharge was an integral part of the 1898 Bankruptcy Act, and both Congress and the judiciary have consistently read the Act as including the 'fresh start' as one of its primary goals." James J. White, *Bankruptcy and Creditors' Rights: Cases and Materials* 29 (1985) citing R. Lewis Townsend, *Fresh Cash-Another Element of Bankrupt's Fresh Start?* 31 U. Miami L. Rev. 275, 281 (1977).

> of life, and who if relieved from the burden of debt, would reenter the struggle with fresh hope and vigor and become active and useful members of society. . . .
>
> [T]he passage of a bankrupt law . . . will lift these terrible and hopeless burdens, and restore to the business and commercial circles of the country the active and aggressive elements that have met with misfortune and are now practically disabled for the battle of life. . . .
>
> When an honest man is hopelessly down financially, nothing is gained for the public by keeping him down, but, on the contrary, the public good will be promoted by having his assets distributed ratably as far as they will go among his creditors and letting him start anew.

In sum, the 1898 Act reflected Congress's view that the bankruptcy discharge is a foundational concept underlying bankruptcy law, and that it served the public interest as well as interests of the individual debtor. "[T]he 1898 law recognized formally for the first time the overriding *public* interest in granting a discharge to 'honest but unfortunate' debtors." Tabb, *Discharge, supra*, at 364 (emphasis in original). "The theory is that . . . the debtor then is able to resume his

or her place as a productive member of society." Tabb, *supra*, at 364-65.[14]

The 1898 Act's discharge provisions were before this Court at least three times between 1904 and 1934. During this period this Court endorsed the twin notions of a fresh start as being a benefit both to the debtor and the public, as well as the need for injunctive protection. *Wetmore v. Markoe*, 196 U.S. 68, 77 (1904);[15] *Williams v. U.S. Fid. & Guar. Co.*, 236 U.S. 549, 554-55 (1915).[16]

In 1934, this Court confirmed the ability of a bankruptcy court to enjoin creditor action in derogation of the discharge, thus presaging the enactment of § 524(a)(2). *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934). This injunctive power was tied directly to the notion of the fresh start and the public interest as well. *Id.* Indeed, the discharge was seen as a "fundamental private necessity." *Id.* at 245. But there was also a public benefit: "This purpose of the Act has been again and

---

[14] Professor Tabb cites F. Noel: "The history of these laws is evidence of man's humanity to his fellow man." F. Noel, *A History of the Bankruptcy Law* 200 (1919).

[15] The Court held that the discharge did not apply, however, to a claim for alimony as it viewed such a claim as not being a "provable debt." This issue is obviously not before the Court.

[16] "It is the purpose of the bankrupt act to convert the assets of the bankrupt into cash for distribution among creditors, and then to relieve the honest debtor from the weight of oppressive indebtedness, and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes."

again emphasized by the courts as being of public as well as private interest. . . ." *Id.* at 244.

B. Congress amended the 1898 Act in 1970 to further strengthen the discharge protection by including an injunction against collection activities on discharged debts.

In 1970, Congress codified *Local Loan* by making the order of discharge an injunction, declaring that "an order of discharge shall enjoin all creditors whose debts are discharged from thereafter instituting or continuing any action . . . to collect such debts. . . ." Pub. L. No. 91-467, § 3, 84 Stat. 990, 991 (1970).

The 1970 amendments also rejected the notion that a discharge should merely be an affirmative defense by adding § 14f to the Bankruptcy Act, declaring that state court judgments are "null and void" to the extent they determined the personal liability attaching to a discharged debt. The rule until 1970 was that the bankrupt had the burden of pleading the certificate of discharge as an affirmative defense. Tabb, *supra*, at 360. If the debtor failed to plead the discharge, a final judgment could be entered despite the discharge, which would be given res judicata effect. Tabb, *id.* (citing Vern Countryman, *New Dischargeability Law*, 45 Am. Bankr. L.J., 1-2 (1971), in turn citing *Dimock v. Revere Cooper Co.*, 117 U.S. 559 (1886)).[17]

---

[17] In *Local Loan* the Supreme Court held that a bankruptcy court had the jurisdiction to enjoin a creditor from suing a debtor

The legislative history made it clear that the purpose was to prevent creditors from suing debtors on discharged claims in the hope that they might not appear and thus could obtain a default judgment against the debtor.

> [T]he major purpose of the proposed legislation is to effectuate, more fully, the discharge in bankruptcy by rendering it less subject to abuse by harassing creditors. Under present law creditors are permitted to bring suit in State courts after a discharge in bankruptcy has been granted and many do so in the hope the debtor will not appear in that action, relying to his detriment on the discharge. . . . As a result, a default judgment is taken against him. All this results because the discharge is an affirmative defense which, if not pleaded, is waived.[18]

---

on a discharged claim, but the injunction required action in the individual case. *See* 293 U.S. at 238.

[18] H.R. Rep. No. 91-1502 (1970), *as reprinted in* 1970 U.S.C.C.A.N. 4156. *See also* 116 Cong. Rec. 34,818 (Statement of Rep. Wiggins) (as quoted in *Lone Star Security Video, Inc. v. Gurrola* (*In re Gurrola*), 328 B.R. 158, 168 n.9 (B.A.P. 9th Cir. 2005), noting that by making the discharge an affirmative defense "the concept of a discharge in bankruptcy by which the Bankruptcy Act attempts to assure the honest but unfortunate person a fresh start is defeated."

C. The 1978 Code added §§ 524(a)(1) and (a)(2) to prevent creditor conduct in derogation of the discharge; the Ninth Circuit's decision is contrary to the Congressional goals and purposes.

In the 1978 Code Congress enlarged the discharge injunction provision in new § 524(a)(2), as well as providing for other discharge protections. The Ninth Circuit's decision is contrary to the goals and purpose of §§ 524(a)(1) and (a)(2).

The Code contains a broad discharge provision,[19] and carries forward the same notion of the central importance of the discharge as found in the Act of 1898 and its amendments. The Code provides for the same three critical protections, each of which is pertinent here. It made the discharge non-discretionary and thus limited the role of the court in entering the discharge order; it provided for a stronger statutory injunction against suing on discharged claims; and it provided that acts taken in violation of the discharge are void. The goal was to protect against the very conduct that occurred in this case, namely, creditors suing debtors despite the discharge of the claim.

First, the 1978 Code continues to eliminate most judicial involvement in the decision on whether to enter an order of discharge. In the absence of a statutory exception to discharge (not relevant here) § 727 of the

---

[19] The discharge is broad. It "discharges the debtor from all debts that arose before the date of the [bankruptcy petition]." 11 U.S.C. § 727(b) (2018).

Code provides that a bankruptcy court "shall grant the debtor a discharge." The Bankruptcy Rules provide that a discharge is to be entered as a matter of course after the time for filing objections has lapsed. *See* Fed. R. Bankr. P. 4004(c)(1).

This effort to remove the bankruptcy court from threshold determinations concerning the discharge is pertinent here, because the effect of the Ninth Circuit's decision is to involve the bankruptcy courts in determinations of a creditor's knowledge of the discharge; the Ninth Circuit has effectively interjected a new judicial role, despite Congress's long-standing efforts to do precisely the opposite.

Second, debtors are protected from creditor interference with their discharge by § 524(a)(2), which states that discharge "operates as an injunction against the commencement or continuation of an action . . . to collect, recover or offset any such debt as a personal liability of the debtor." Section 524(a) "retained and elaborated" on the provisions of § 14f of the Bankruptcy Act, and the legislative history made plain that Congress wanted precisely to preclude creditors suing debtors on discharged debts:

> Subsection (a) specifies that a discharge in a bankruptcy case voids any judgment to the extent that it is a determination of the personal liability of the debtor with respect to a prepetition debt. . . . *The injunction* is to give complete effect to the discharge and *to eliminate any doubt concerning the effect of the discharge as a total prohibition on debt*

> *collection efforts*. . . . [It] is intended to insure that once a debt is discharged, the debtor will not be pressured in any way to repay it.[20]

Finally, § 524(a)(1) sought to prohibit creditors from suing on discharged claims by providing that a judgment obtained on a discharged debt is "void." As noted above, Congress provided that the discharge is not merely an "affirmative defense" in a collection suit, but is an absolute, non-waivable defense, and that any judgment obtained in violation of the discharge is of no effect.[21] *See In re Gurrola*, 328 B.R. at 170.

Thus, "the enactment of § 524(a) and its predecessor reflect a clearly expressed and identified Congressional intent that a debtor be able to rely on the bankruptcy discharge without the burden of establishing her rights under the discharge against a meritless claim that is excepted from discharge and without being subjected to an adverse judgement by failure to defend." *In re Meadows*, 428 B.R. 894 (Bankr. N.D. Ga. 2010) (citing the legislative history of § 524, *supra*).

---

[20] H.R. Rep. No. 95-595 at 365-66 (1977) *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6321-22 (emphasis added). The Senate Report is the same. S. Rep. No. 95-989 at 80 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5787, 5866.

[21] *See In re Hamilton*, 540 F.3d 367, 372 (6th Cir. 2008). "This provision was designed 'to effectuate the discharge and make it unnecessary to assert it as an affirmative defense in a subsequent state court action.'" (citation omitted). *But cf.*, *Strata Res. v. State*, 264 S.W.3d 832, 843 (Tex. App. 2008).

D. Congress did not intend for creditors to be able to disregard the discharge injunction based on a subjective standard of good faith or ignorance of the law.

There is nothing in the text or history of the Code to suggest that Congress intended to permit creditors to evade the discharge injunction by showing merely a subjective, good faith belief that they were in compliance. The standard is objective. And Congress certainly did not intend to permit a creditor to rely on the subjective "mistake of law" defense. The Ninth Circuit's decision moves in exactly the opposite direction by sanctioning a highly subjective declaration of good faith, even if unreasonable, as a defense.

This Court has held that a subjective good faith intent is not a defense to a violation of a civil injunction. Thus, in *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191, 599 (1949) the Court stated as follows:

> The absence of willfulness does not relieve from civil contempt. Civil as distinguished from criminal contempt is a sanction to enforce compliance with an order of the court or to compensate for losses or damages sustained by reason of noncompliance. Since the purpose is remedial, it matters not with what intent the defendant did the prohibited act. The decree was not fashioned so as to grant or withhold its benefits dependent on the state of mind of respondents (citations omitted).

Likewise, the use of a subjective standard in the context of the bankruptcy injunction is even more inappropriate. Congress specifically intended for the discharge provisions *"to eliminate any doubt concerning the effect of the discharge as a total prohibition on debt collection efforts."*[22] Unlike civil injunctions, in which the court crafts a new injunction order from whole cloth, such is not the case in a bankruptcy matter. *See generally, In re Rose, supra*, at 183 n.12. It has been almost 50 years since Congress first introduced the injunction in § 14f of the prior Bankruptcy Act. Its essential mandate has not varied. The notion that a creditor cannot perceive the scope or application of the injunction is specious.

Even more so, the application of *Taggart* to institutional and corporate creditors is highly problematic, and one court has noted that none of the *Taggart* cases even address the issue of institutional creditors: "It is one thing for individuals to testify as to their subjective beliefs, but quite another for corporate representatives to testify as to the subjective belief of a corporation." *In re Rose*, 565 B.R. 178, 183 n.11 (Bankr. D. Nev. 2017).

This subjective standard will immerse the courts in precisely the fashion that both the Bankruptcy Act and the Code expressly sought to avoid. Bankruptcy courts will be forced to "engage in novel and unfettered inquiries into a 'creditor's state of mind.'" *Midland*,

---

[22] H.R. Rep. No. 95-595 at 365-66 (1977), *supra* (emphasis added).

137 S.Ct. at 1419 n.5 (Sotomayor, J. dissenting). Similarly, in *In re Rose*, 565 B.R. 178, 183 n.11 (Bankr. D. Nev. 2017) the bankruptcy court expressed its concern that this highly subjective standard "opens the door to the assertion of too many 'Sargent Schultz' defenses ('I know nothing! Nothing!'), at the expense of the peace of mind that the discharge is supposed to provide to the individual debtors" (citation omitted).

A claim that one lacked an understanding of the law is also no defense to a violation of the discharge. This Court recently had occasion to consider whether a defense based on ignorance of the law, or mistake of law, should be permitted in somewhat similar circumstances. *Jerman v. Carlisle, McNellie, Rini, Kramer & Urlich, LPA*, 130 S.Ct. 1605 (2010). In *Jerman*, this Court held that in determining whether mistake of law is a defense the Court should look to the "statute's context and history." *Id.* at 1607.

Jerman concerned the Fair Debt Collection Practices Act. Section 813(c) of the Act, 15 U.S.C. § 1692k(c) provides that a debt collector is not liable in action brought under the Act if she can show "violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." *Id.* at 1607. The question presented was "whether the bona fide error" defense in § 1692k(c) applies to a violation resulting from a debt collector's mistaken interpretation of the legal requirements of the FDCPA. *Id.* at 1607.

The Court held that ignorance of the law was not a defense. "We have long recognized the 'common maxim, familiar to all minds, that ignorance of the law will not excuse any person, either civilly or criminally.'" *Id.* at 1611, citing *Cheek v. United States*, 498 U.S. 192 (1992).

Further, the Court in *Jerman* held, "[o]ur law is therefore no stranger to the possibility that an act may be 'intentional' for purposes of civil liability, even if the actor lacked actual knowledge that her conduct violated the law" (citing *Kolstad v. American Dental Assn.*, 527 U.S. 526 (1999). *Id.* at 1612.

And, "[l]ikely for this reason, when Congress has intended to provide a mistake-of-law defense to civil liability, it has often done so more explicitly than here." *Id.* at 1612. Thus, this Court held that it was a "fair inference that Congress chose to permit injured consumers to recover actual damages . . . for 'intentional conduct,' including violations resulting from mistaken interpretation of the FDCPA. . . ." *Id.* at 1612.[23]

---

[23] The bankruptcy court below referred to the test for contempt under § 105 as being a "willful" violation of the injunction. *In re Taggart*, 522 B.R. 627, 631 (Bankr. D. Or. 2014). But the same court stated that willful is defined in *Hardy* as meaning nothing more than an intent to do the acts which violate the injunction. *Id.* at 632. Your amici contend that the Code does not require a showing of "willfulness' nor is such to be implied. "It is sufficient that the creditor knows of the bankruptcy and engages in deliberate conduct that, it so happens, is a violation of the stay." In *IRS v. Murphy*, 892 F.3d 29, 37 (1st Cir. 2018) noting that the term "willfully" is a "chameleon." *Id.* at 35. The First Circuit further noted that in "common usage" the term "willful" was considered

The same rationale applies here. Indeed, this case is even stronger, as there is no statutory defense of "bona fide error." The context and history of the Code preclude any reliance on the notion that Congress intended for the creditor's unreasonable lack of knowledge that the discharge applied to its claim to undo its carefully crafted discharge provisions.

II. The Ninth Circuit's use of a subjective defense of good will will permit creditors to easily disregard the discharge injunction.

The Ninth Circuit's decision that a good faith, subjective belief can excuse disregarding the bankruptcy injunction will encourage exactly the kind of abusive creditor conduct that Congress has sought to eliminate. If a debtor objects to the filing of a claim on a discharged debt, a creditor can readily plead lack of knowledge that the discharge applied to its claim. Thus, instead of merit-based resolutions, the system will allow under-represented and *pro se* debtors to be intimidated into surrendering their opportunity for a fresh start.

Numerous factors underlie the corrosive impact the Ninth Circuit's decision will have in making abusive conduct less risky. First, Congress intended to "make it unnecessary to assert [discharge] as an affirmative defense in a subsequent state court action." *See In re Hamilton*, 540 F.3d 367, 372 (6th Cir. 2008). "The

---

synonymous with such words as "voluntary," "deliberate" and "intentional." *Id.*

purpose of the provision [§ 524] is to make it absolutely unnecessary for the debtor to do anything at all in the collection action." *Id.* at 373. Despite this mandate some state statutory enactments still identify discharge as an affirmative defense and some courts seem to make statements that vary from the federal law. *See, e.g., Strata Res. v. State*, 264 S.W.3d 832, 843 (Tex. App. 2008); *see also* Tex. R. Civ. P. 94 ("In a pleading to a proceeding a party shall set forth affirmatively . . . discharge in bankruptcy. . . .").[24]

Congress recognized that individual debtors are unlikely to appear and defend against collection suits, regardless of a valid defense. Consumer debtors often permit the entry of default judgments, regardless of the merits of a claim; institutional debt collectors take advantage of this. "[C]onsumers do fail to defend themselves in court—in fact, according to the FTC, over 90% fail to appear at all. . . . The result is that debt buyers have won 'billions of dollars in default judgment' by simply filing suit and betting that consumers will lack the resources to respond." *Midland Funding, LLC v.*

---

[24] Some state procedural rules may have followed Fed. R. Civ. P. 8, which until 2010, provided that the bankruptcy discharge was an affirmative defense. However, the Committee Note to the 2010 amendments now clarifies this: "Subdivision (c)(1). 'Discharge in bankruptcy' is deleted from the list of affirmative defenses. Under 11 U.S.C. § 524(a)(1) and (2) a discharge voids a judgment to the extent that it determines a personal liability of the debtor with respect to a discharged debt. The discharge also operates as an injunction against commencement or continuation of an action to collect, recover, or offset a discharged debt. For these reasons, it is confusing to describe the discharge as an affirmative defense."

Johnson, 137 S.Ct. 1407, 1417 (Sotomayor, J., dissenting).[25]

Moreover, the burden of proof is a substantial barrier for debtors who seek to enforce the discharge injunction in bankruptcy court. The Ninth Circuit held that "the moving party [the debtor] has the burden of showing by clear and convincing evidence that the contemnors violated a specific and definite order of the court." *In re Taggart*, 888 F.3d at 443. *See also In re Dyer*, 322 F.3d 1178, 1190 (9th Cir. 2003). Further elaborating, the court stated that "to justify sanctions the movant [the debtor] must prove that the creditor (1) *knew the discharge injunction was applicable* and (2) intended the actions which violated the injunction." *Id.* (emphases added).

Thus, the debtor's burden includes specific showings of "knowledge" of the injunction's applicability, a highly subjective state of mind that must be shown by clear and convincing evidence. Under the clear and convincing standard, the debtor must "place in the ultimate fact finder an abiding conviction that the truth of its factual contentions are 'highly probable.' Factual contentions are highly probable if the evidence offered in support of them 'instantly tilt[s] the evidentiary scales in the affirmative when weighed against the

---

[25] This observation is supported by the empirical literature. *See generally* Peter A. Holland, *Junk Justice: A Statistical Analysis of 4,400 Lawsuits Filed by Debt Buyers*, 26 Loy. Consumer L.Rev. 179 (2014).

"evidence [the non-moving party] offered in opposition.'" *Emmert v. Taggart* (*In re Taggart*), 548 B.R. 275, 288 n.11 (B.A.P. 9th Cir. 2016) (citation omitted).

Assuming the debtor somehow shows the requisite intent and knowledge, the burden then shifts to the creditor, who can prevail merely by showing "good faith."[26] One may fairly question how the typical individual debtor can realistically rebut an institutional creditor's subjective claim of good faith. Bad faith cannot be inferred from knowledge of the bankruptcy alone. *In re Taggart*, 888 F.3d at 443. An unreasonable belief that a creditor was not barred from suing on a discharged claim will often be easily created, and it is difficult to imagine how a debtor could satisfy its burden in refuting good faith, absent an unlikely "confession" by the creditor.

Finally, burden aside, the cost and time to litigate the creditor's state of mind will often be beyond what an individual debtor can sustain. The subjective standard of "good faith" would require the debtor to engage in costly discovery, some of which is likely to be resisted. Individual debtors frequently lack the resources to pay legal counsel to defend against discharge litigation, as Congress has recognized. Prior to enactment of the 1978 Code, the House Judiciary

---

[26] This is precisely what occurred below. The bankruptcy court concluded that the respondents "knowingly violated the discharge injunction." *In re Taggart*, 888 F.3d at 444. The bankruptcy court found that a good faith belief that the discharge was inapplicable was irrelevant. *Id.* The BAP, however, held that a good faith belief was determinative. 548 B.R. at 290.

Committee noted that "[t]he threat of litigation over this [discharge] exception and its attendant costs are often enough to induce the debtor to settle for a reduced sum, in order to avoid the costs of litigation" even with respect to "marginal cases." H.R. Rep. No. 95-595 (1977).[27] *See also* Andrew F. Emerson, *So You Want to Buy a Discharge? Revisiting the Sticky Wicket of Settling Denial of Discharge Proceedings in the Chapter 7 Bankruptcy*, 92 Am. Bank. L.J. 111, 118-23 (2018).

Debtors are unlikely to be able to rely on their Chapter 7 counsel to represent them in discharge litigation. Lawyers have no duty to do so. Legal counsel for Chapter 7 debtors frequently "unbundle" their legal services and decline to undertake representation of the debtor in an adversary proceeding challenging the discharge.[28] "Unbundling" allows an attorney to limit the scope of his or her representation by excluding expensive tasks like adversary proceedings from their general services. Chapter 7 debtor counsel have no obligation to represent the debtor post-discharge if a civil suit is filed in state court to collect on a discharged

---

[27] *See also* William F. Stone, Jr. & Bryan A. Stark, *The Treatment of Attorneys' Fee Retainers in Chapter 7 Bankruptcy and the Problem of Denying Compensation to Debtors' Attorneys for Post-Petition Legal Services They Are Obligated to Render*, 82 Am. Bankr. L.J. 551, 555 n.25 (2008).

[28] For example, Local Rule 2090-5(B) of the Bankruptcy Court for the Northern District of Illinois expressly excludes representation in adversary proceedings from the duties of an attorney arising from an appearance on behalf of a debtor.

claim and debtors who appear *pro se* have less favorable outcomes in judicial proceedings.[29]

Conversely, intuitional creditors are typically well-represented by counsel. The plaintiff in such suits is frequently not the original creditor, but one of the "bottom fishers" who buy consumer debt for pennies on the dollar, and often file suits despite facial defects.[30] These institutional creditors are well-funded, and their costs are diminished by the likelihood that consumers will lack the resources to defend the discharge. *See id.* ("The clearest trend, repeatedly highlighted in the literature, is that defendants often do not respond to collection suits.") Holland, *Junk Justice*, *supra*, at 227.

These concerns over creditor disregard of the injunction are not hypothetical. In the relatively short time since *Taggart* was decided there have been numerous decisions which illustrate the ease by which the injunction is ignored. Some of these cases are discussed in the amicus brief of the National Consumer Bankruptcy Rights Center filed in these proceedings (NACBA Br. p. 7 *et seq.*) "In each of the cases cited

---

[29] *See, e.g.*, Rafael I. Pardo, *An Empirical Examination of Access to Chapter 7 Relief by Pro Se Debtors*, 26 Emory Bankr. Dev. J. 5 (2009); Angela Littwin, *The Affordability Paradox: How Consumer Bankruptcy's Greatest Weakness May Account for Its Surprising Success*, 52 Wm. & Mary L. Rev. 1933, 1957 (2011) ("The percentage of pro se cases rose statistically significantly, especially among lower-income debtors, while the percentage of these cases ending with a discharge of debt declined.").

[30] *See generally* Holland, *Junk Justice, supra; Midland Funding*, 137 S.Ct. 1407 (2017).

above, including *Taggart*, the debtor proved that the debtor filed bankruptcy, the creditor's debt was listed, the creditor received notice of the discharge, the creditor did not object to the discharge, and that the creditor continued to personally collect against the debtor or debtor's property on a debt it knew was discharged.[31] In each of the cases the debtor's counsel informed the creditor or its counsel that the creditor's actions were violating the discharge injunction. In each case, the creditor continued its collection action." *Id.* at 14. Indeed, what these four cases demonstrate is that even a debtor's notification to the creditor in writing explaining that the debt is discharged is insufficient to show the requisite subjective intent. *Id.* at 14.

III. Empirical studies and academic scholarship demonstrate that the bankruptcy discharge has been effective in achieving the Congressional goals and policies that underlie the discharge provisions.

A substantial body of scholarship and empirical evidence demonstrates that the Congressional goals inherent in the discharge provisions have been effective. The discharge has proven to be of vital importance to both the individual debtor and to the larger

[31] *Parker v. Nelson* (*In re Nelson*), No. 15-1416, 2016 WL 7321196 (B.A.P. 9th Cir. Dec. 15, 2016); *Rogerson v. Shaw* (*In re Shaw*), No. 15-1406, 2017 WL 2791663 (B.A.P. 9th Cir. June 27, 2017); *Morning Star Company v. Benech* (*In re Benech*), 17-CV-05100-LHK (N.D. Cal. July 25, 2018) (NACBA App. 1a); *Bruce v. Fazilat* (*In re Bruce*), Adv. No. 8-15 ap-01028, 2018 WL 3424581 (Bankr. C.D. Cal. July 12, 2018).

economy.[32] The effect of the Ninth Circuit's decision, however, would greatly diminish the effectiveness of the Congressional discharge scheme.

The discharge provisions are properly targeted towards those who need the protection. Empirical analysis has demonstrated those who file for bankruptcy relief and seek the discharge are in desperate need of relief, not "can pay" debtors and typically endure serious stigma from the filing. The typical individual debtor turns to bankruptcy due to a serious economic plight, rather than because of over-spending, or other non-productive economic behavior. "[W]hen bankrupt debtors as a group are compared to the general population, their situations are grim." Teresa A. Sullivan, et al., *As We Forgive Our Debtors: Bankruptcy and Consumer Credit in America* 77 (1999). The authors found that debtors have "staggering debts in relation to their income" and are a "segment of America in financial collapse." *Id.*[33]

Second, the decision to file for bankruptcy is usually the result of oppressive debt obligations, including

---

[32] While some of the articles are twenty years old, their influence continues to the present day, and their underlying insights remain valid. *See generally* Michael D. Sousa, *The Persistence of Bankruptcy Stigma*, 26 Am. Bankr. Inst. L. Rev. 217 (2018) (hereafter "Sousa") (collecting prominent research articles and substantial databases on discharge issues).

[33] "The economic profile of debtors [in their study] demonstrated that the latter group was in far worse financial trouble than their earlier counterparts as measured by, among other variables, debt-to-income ratios and the amount of average unsecured debt." Sousa, *supra* at 228.

catastrophic medical problems such as cancer, automobile and industrial accidents, and age-related issues.[34] When asked why they filed for bankruptcy, 67.5 percent of debtors reported job loss, 19.3 percent cited a medical event, and 22.1 percent listed family concerns (i.e., divorce for example) as contributing factors. Teresa A. Sullivan, et al., *The Fragile Middle Class: Americans in Debt*, 16 fig. 1.2 (2000). These Americans file for bankruptcy not because it is "an easy way out," but because they have exhausted their other options. Teresa A. Sullivan, et al., *Limiting Access to Bankruptcy Discharge: An Analysis of the Creditors' Data*, 1983 Wis. L. Rev. 1091, 1138 (1983). In other words, "[f]ew people file bankruptcy without crushing debts." Sousa, *supra*, at 226.

The filing for bankruptcy is traumatic and causes feelings of stigma and shame.[35] According to empirical data collected by Professor Michael D. Sousa, most of the debtors he interviewed "experienced deep feelings of shame, embarrassment and instances of stigmatization." Sousa, *supra*, at 230. Indeed, "bankruptcy stigma appears to have increased over the past four

---

[34] Maurie Backman, *This Is the No. 1 Reason Americans File for Bankruptcy*, The Motley Fool (May 1, 2017) https://www.fool.com/retirement/2017/05/01/this-is-the-no-1-reason-americans-file-for-bankrup.aspx.

[35] "There is robust literature in the social sciences regarding the association between socioeconomic disadvantage and mental health, including suicide. . . . [T]he more debt an individual possessed the more likely that he or she suffered from mental disorder, neurosis, psychosis, alcohol dependency or drug dependency." Sousa, *supra* at 232 (citations omitted).

decades. . . ." *Id.* at 235. "[S]tigma has increased and the rising numbers of filings are actually the net result of two opposing trends—economic forces may have pushed more families to the brink of bankruptcy, while increasing stigma may have prevented even more distressed families from filing." *Id.* at 239 (citing Teresa L. Sullivan, et al., *Less Stigma or More Financial Distress: An Empirical Analysis of the Extraordinary Increase in Bankruptcy Filings*, 59 Stan. L. Rev. 213, 228-33 (2006)).

Discharge is vital in a third respect: it has shown a demonstrable effect in restoring debtors to a productive role in the larger economy. Indeed, "the average person who files for bankruptcy to relieve financial stress catches up with their peers." Jay L. Zagorski & Lois R. Lupica, *A Study of Consumers' Post-Discharge Finances: Struggle, Stasis, or Fresh-Start?* 16 Am. Bankr. Inst. L. Rev. 283, 289 (2008).[36] "None of the data indicate that over time the size of the financial gap between bankruptcy filers and non-filers either gets wider or stays the same; for the most part, the size of the financial gap between these two groups narrows over time." *Id.* at 307.

Fourth, without bankruptcy discharge, only a small fraction of debtors have any hope of repaying their debt outside of bankruptcy. Even those debtors who voluntarily attempted repayment in Chapter 13

---

[36] *See also* Katherine Porter & Deborah Thorne, *The Failure of Bankruptcy's Fresh Start*, 92 Cornell L. Rev. 67, 87 (2006) ("The majority, 65% of families, reported that their financial situations had improved since they filed bankruptcy.").

often failed: at most, only about a third were able to complete their repayment plans, and a significant portion of those debtors were making only minimal repayments. *See* Teresa A. Sullivan, et al., *Consumer Debtors Ten Years Later: A Financial Comparison of Consumer Bankrupts 1981–1991*, 68 Am. Bankr. L.J. 121, 123 (1994).

Discharge benefits both debtors and the larger macro economy. "The theory is that society as a whole benefits when an overburdened debtor is freed from the oppressive weight of accumulated debt. The debtor then is able to resume his or her place as a productive member of society." Charles J. Tabb, *The Historical Evolution of the Bankruptcy Discharge*, 65 Am. Bankr. L.J. 325, 364-65 (1991). "Bankruptcy law . . . serves significant macroeconomic goals[;] . . . the Chapter 7 debt discharge prevents the development of an insolvent underclass. . . ." Amber J. Moren, Note, *Debtor's Dilemma: The Economic Case for Ride-Through in the Bankruptcy Code*, 122 Yale L.J. 1594, 1618 (2013).

Ultimately, empirical data show that "bankruptcy laws are generally serving the people they were designed to serve: people in serious, even hopeless financial trouble, who need either a fresh-start discharge from their debts or at least some [breathing spell]." Sullivan, *As We Forgive Our Debtors*, *supra*, at 77. This Court has consistently emphasized that the bankruptcy discharge is of profound public and private importance. In 1915 this Court correctly perceived the need to have a legal system that restores debtors to

productive participation in the economy. *See Williams v. United States*, 236 U.S. 549, 554-55. In 1918, this Court emphasized the "great public interest" in protecting the discharge. *Stellwagen v. Clum*, 245 U.S. 605, 617 (1918).

The Ninth Circuit's decision plainly would impair the financial and social benefits that Congress intended for the discharge to achieve.

CONCLUSION

For the foregoing reasons, we respectfully request that this Court reverse the decision of the Ninth Circuit.

Dated: February 2019

Respectfully submitted,

DAVID R. KUNEY
Counsel of Record
9200 Cambridge Manor Court
Potomac, MD. 20854
301-299-9544
davidkuney@dkuney.com
Attorney for Amici Curiae